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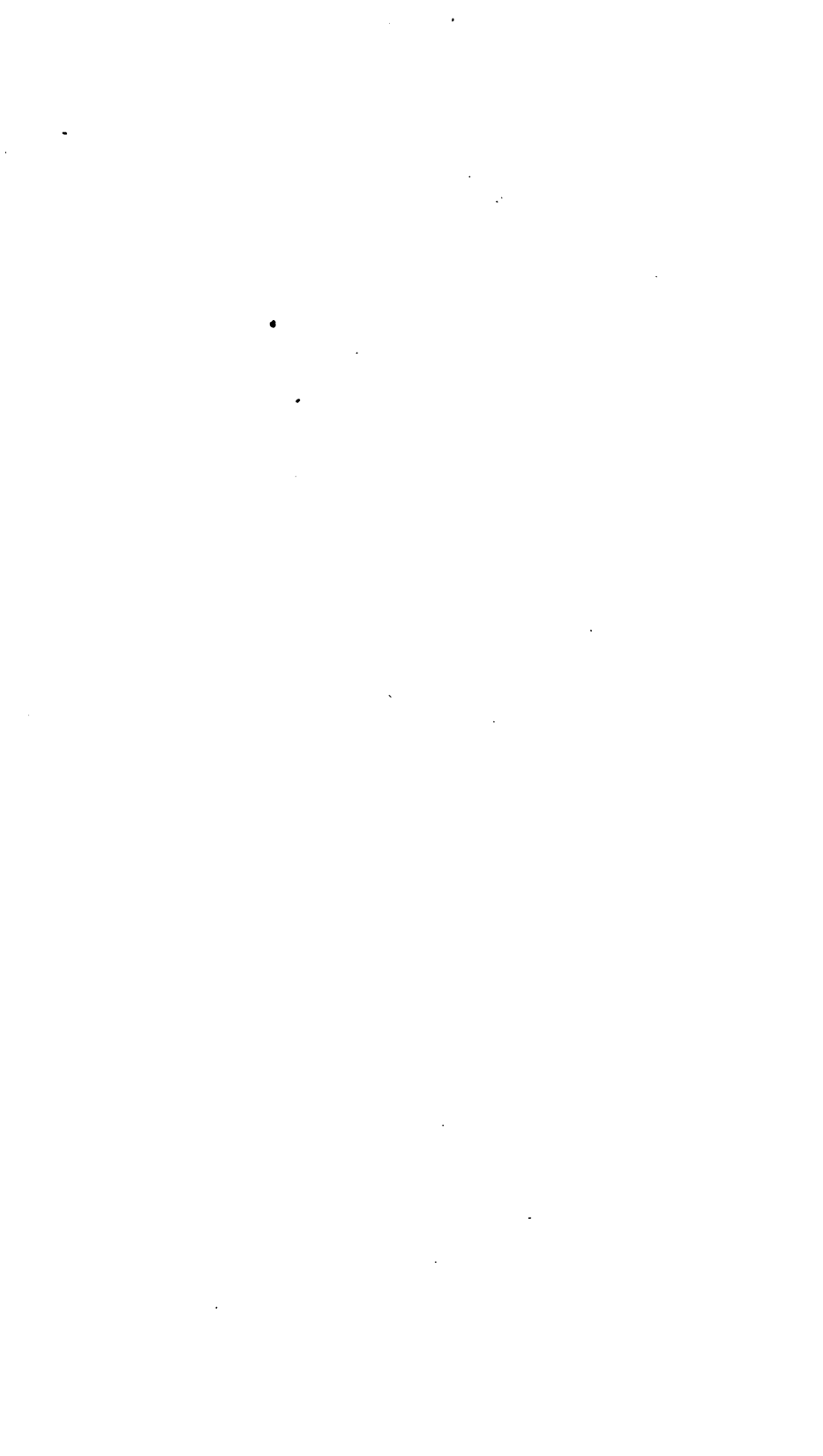
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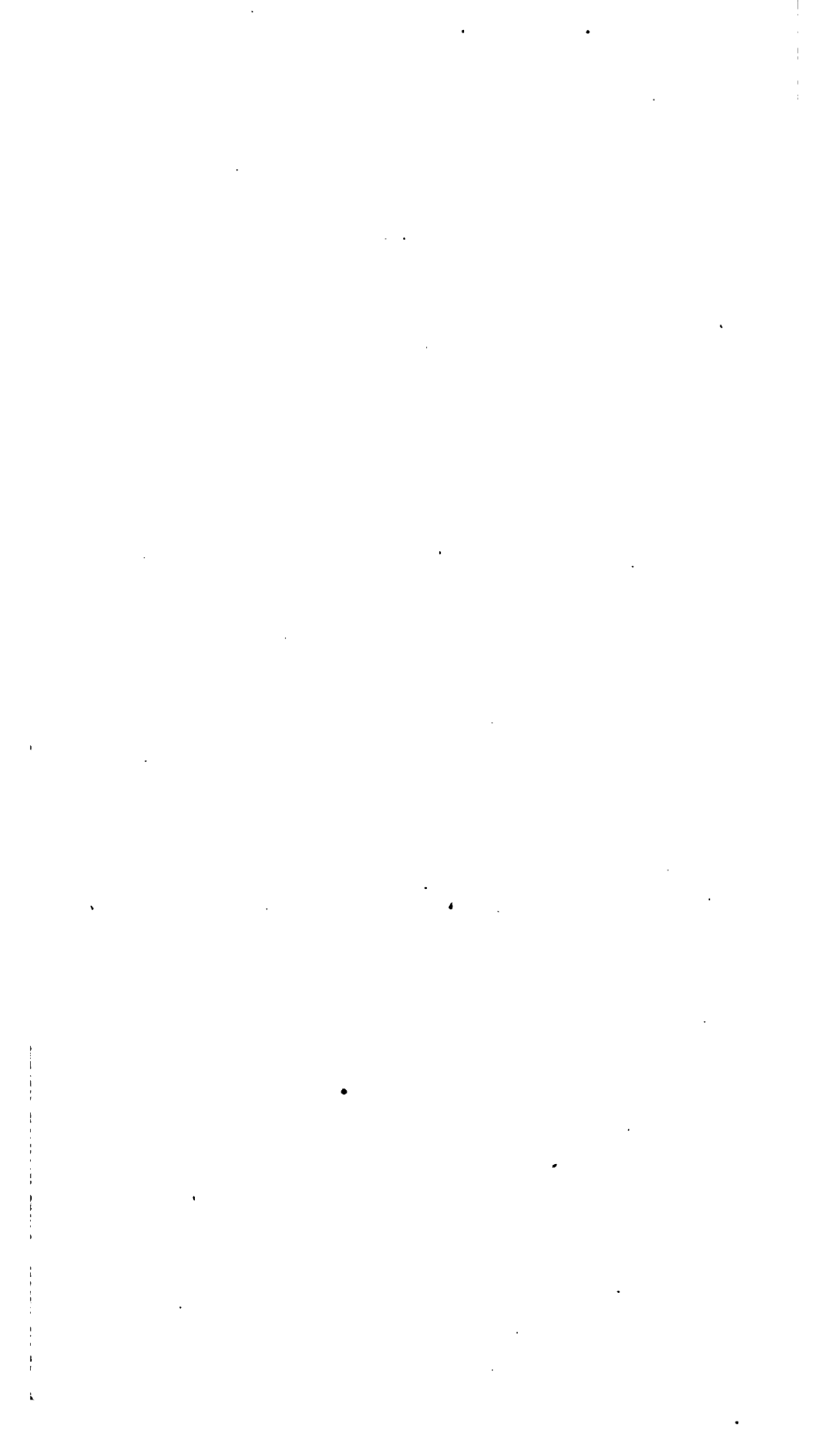
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED

By A. C. FREEMAN,

CONFEREE AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

Vol. XIX.

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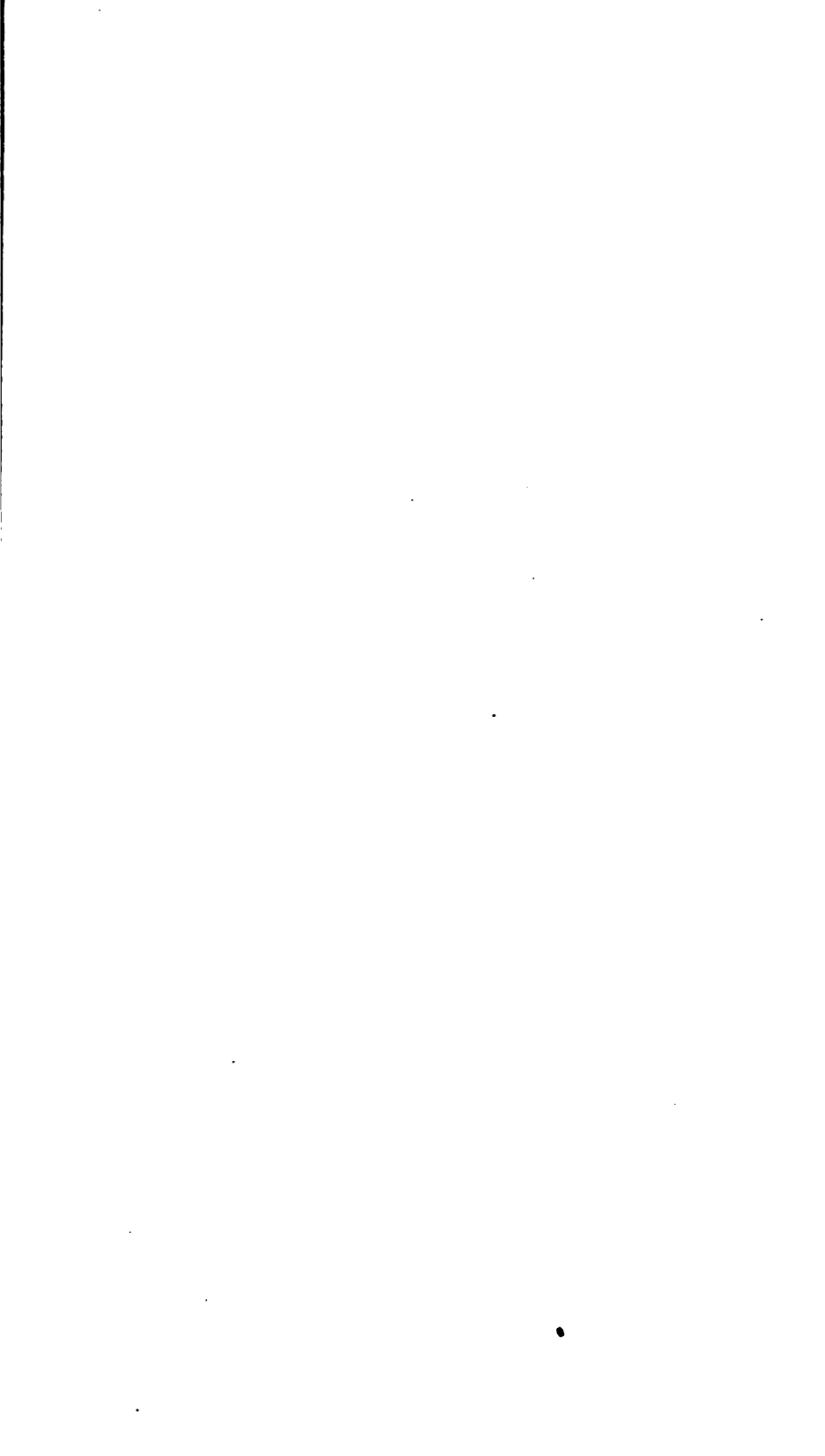
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AMERICAN DECISIONS.
VOL. XIX.



CASES
IN THE
SUPREME COURT
OF
ALABAMA.

ALLEN, v. BOOKER.

[2 STEWART, 21.]

PAYMENT OF A PART OR THE WHOLE of the purchase price, is insufficient to take a contract out of the statute of frauds.

ASSUMPSIT FOR MONEY HAD AND RECEIVED lies for money paid on a contract void by the statute of frauds.

ASSUMPSIT for money had and received on a contract for the purchase of a tract of land. Plaintiff paid the defendant one hundred and twenty-five dollars as a partial payment on a parol contract for the purchase of a piece of land in Arkansas Territory. The court charged the jury that the part payment took the contract out of the statute of frauds, and that inasmuch as the plaintiff might compel the performance of the contract upon paying the balance of the purchase money; that, therefore, he could not abandon the contract and recover the amount paid.

Verdict for defendant. Plaintiff assigned as error that said instructions were incorrect.

Thornton, for appellant.

Kelly and McClung, contra.

By Court, TAYLOR, J. It is considered unnecessary to enter into a minute investigation of the doctrine which governs parol contracts for the sale of land, under the statute of frauds. Our statute is in the precise language of that of England, and of a majority of the states. The constructions given to the statute by the courts of Westminster, are well known. They have determined many cases to form exceptions, notwithstanding the comprehensive terms of the statute; and numerous decrees have

been made by the chancellors of that country by which the specific performance of such contracts has been enforced. The reason for this departure from the letter of the statute, given in those decisions, is, that in the several cases in which the decisions have been made, the defendants were endeavoring to use the statute to effect a fraud upon the plaintiffs; and that it could never have been the intention of the legislature, that a statute made to prevent fraud, should be so expounded as to give a reward to him who practiced fraud.

It has been much questioned, even in England, whether the most correct course for the courts to have adopted would not have been rigidly to execute the statute in accordance with its words; and many of the most enlightened judges of that country have expressed great regret that it has ever been departed from, except in cases of a most extraordinary nature. In modern times there is a much greater indisposition to decree the specific performance of a contract of this description than formerly; and the courts manifest a great inclination again to take shelter under the wings of the statute, from which they had so greatly departed. The observations of Lord Redesdale, in *Lindsay v. Lynch*, 2 Sch. & Lef. 5, indicate this in strong terms.

In the United States, the cases uniformly show, that the courts are rather inclined to restrict than to enlarge the cases of exception to the strict execution of the statute. In the case of *Grant v. Naylor*, 4 Cranch, 235, that distinguished judge, Chief Justice Marshall, observes: "Already have so many cases been taken out of the statute of frauds which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion, that this relaxing construction of the statute ought not to be extended further than it has already been carried, and the court entirely concurs in that opinion." In some of the states it has been determined, that the statute must be rigidly construed, and that no case, whatever the circumstances may be, will authorize an exception: 1 Bibb. 204; 3 Id. 2; also the case of *McClure v. Patten*,¹ lately decided by the court of appeals of Tennessee.

I am not prepared to go the length of the cases last cited. Our statute was enacted long after the construction given to that of England by their courts was known in this country; and we can not suppose that the enlightened body which enacted it, was ignorant of the course pursued by the English courts. If it had been intended to preclude the courts from departing

1. *Patton v. McClure*, Mart. & Y. 333.

from the letter of the law, words to that effect might easily have been inserted. But in the variety of decisions on this subject, I do not now recollect one which determines that the payment of part of the purchase money authorizes a decree of specific performance; nor can I conceive any good reason for such a decision. To authorize a departure from the statute in any case, the party asking it should be so situated, that no other remedy which the law can afford him, would place him in as good a situation as he was before the contract was made; in fact, it must satisfactorily appear that the opposite party is using the statute as an engine of oppression. This would often be the case where possession had been given, and extensive improvements made by the purchaser. But in the present case, the defendant is the vendor, and the repayment of the money by him, will merely place him where he was before the contract was made, which would always be the case, in all instances, where there was nothing done by the parties to the contract, but simply the payment and receipt of the purchase money.

I am therefore clearly of opinion, that neither the payment by the purchaser of a part, nor even the whole of the purchase-money, in such case would, of itself, take the case out of the statute. Therefore the court erred in the instructions given to the jury.

But it is objected, that even should there have been error in this respect, yet the judgment cannot be reversed, for two reasons: 1st. By the terms of the statute, no suit is authorized to recover back the purchase money which has been paid; and 2d. The land which was the subject of the contract, is situated in the Arkansas territory, and the contract must be governed by the laws of that territory; and it does not appear to have been proved on the trial of the cause, that any such law has been enacted, in that territory, as our statute of frauds.

The statute of frauds enacts "that no actions shall be brought whereby to charge the defendant upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof, for a larger term than one year." The clear object is to prohibit any suit to recover damages for the breach of or to enforce the agreement. But the present is not brought for either of these purposes, but is to recover money which the plaintiff alleges he has paid without consideration. The object is not to charge the defendant upon a contract by parol for the sale of lands, but to recover back money which the plaintiff alleges the defendant has received of his. There is certainly no

more danger of the commission of a fraud or perjury in a case of this kind, than in any other action for money. The reason of the law, therefore, does not extend to the case. But I am not left to determine from reason alone; express authority is easily adduced on the subject. The case of *Hunt v. Sanders*, 1 A. K. Marsh. 552, is precisely in point. That was an action of assumpsit, for money had and received, instituted by Sanders in a circuit court of Kentucky, to recover from Hunt a sum of money paid by him to the defendant on a parol contract for the purchase of land. The statute of that state is precisely the same with ours, and a recovery was had in the circuit court, and the judgment affirmed in the court of appeals. In the case of *Grant's Heirs v. Craigmiles*, 1 Bibb, 203, 206, in delivering the opinion of the court, which dismisses the bill filed for a specific performance of a parol contract for the purchase of lands, Judge Bibb observes: "But this is only a partial evil resulting from a general good; an evil, however, not entirely without redress, since a person who has paid a consideration, deemed valuable in law, may have an action to recover back the consideration, although he cannot have the land itself for which it was paid."

In *Myer v. Fisher*, 15 Johns. 503, the court observe: "But there is another ground on which the plaintiff had good right to recover the money received by the defendant on that note. It was received by the defendant without consideration; the contract for the exchange of farms was void by the statute of frauds, being by parol only." There can be no doubt, therefore, but that the suit is well brought. As respects the last point, the question which it involves does not legitimately come before us on this investigation. An exception taken to the opinion of a court, is generally accompanied by so much of the testimony given on the trial, as is sufficient to show plainly the connection and materiality of the charge excepted to, with a correct decision of the case by the jury; and no more. It is not necessary to set out in the record, all the evidence which has been adduced in a cause, when much of that evidence can have no direct bearing upon so much of the charge of the court as is objected to by the counsel taking the exception; nor will the appellate court ever presume, that all the testimony adduced before the inferior tribunal is set out in the record, unless it is so declared to be, or unless it is perfectly evident from the record, that such is the fact. A contrary practice would often bur-

den records with much useless matter, and greatly enhance the costs of parties. In this case it does not certainly appear, whether it was on the statute of Arkansas territory or of this state, that the charge of the circuit court was founded. It is true, the probability is, it was on the statute of Alabama; but from the record, it possibly may have been otherwise. But even were it so on the statute of this state, the court may previously have determined that the contract was governed by the laws of Alabama; or the question may never have been raised below, when, if it had, and the production of a statute of Arkansas like our own was required, the plaintiff might either have produced the law; or, if he knew it existed, suffered a nonsuit; or, upon an affidavit of surprise, applied for a new trial: 11 Wheat. 81. I am, therefore, of opinion that this last is no ground upon which the judgment can be affirmed.

For these reasons the judgment must be reversed, and remanded. And of this opinion is a majority of the court.

Judge SAFFOLD not sitting.

As to what acts of part performance are sufficient to take a contract out of the statute of frauds, see *Chapman v. Allen*, 1 Am. Dec. 24; *Givens v. Calder*, 2 Id. 686; *Meach v. Perry*, 6 Id. 719; *Jones v. Peterman*, 8 Id. 672; *Ricker v. Kelly*, 10 Id. 38.

BRANNAN v. OLIVER.

[2 STEWART, 47.]

ADMINISTRATOR MAY PURCHASE AT HIS OWN SALE, and the same is not *per se* void, but it is *prima facie* valid, it appearing that the sale was public and that there had been no unfairness in the same.

SALE OF LAND IN ANOTHER STATE, without an order of court, will not be held invalid, it not appearing that such order was required by the laws of the state where the sale was made.

BILL in equity, filed by Dyonisius Oliver, a minor, by his next friend, against Mary Ann Brannan, James D. Godbold, James Wade, and Edward Stedham. The opinion states the case.

Bagby, Lyon, Parsons, and Cooper, for appellants.

Hitchcock, *contra*.

By COLLIER, J. This cause presents for the decision of the court the following questions: 1. Can an administratrix become a purchaser at a sale, made by herself, of her intestate's estate? 2. Will a sale made by an administratrix of her intestate's estate, in another state, without an order of court, be consid-

ered regular, when it does not appear what is the law of that state?

An administrator is considered as a trustee for the benefit of the creditors and distributees of his intestate's estate; and upon that hypothesis, I proceed to consider this case. The weight of English authority is against the right of the trustee to purchase the estate of his *cestui que trust*, and is predicated upon reasoning, the force of which must impress itself upon every mind. To permit a trustee to purchase, while he is enjoying the confidence of his *cestui que trust*, it is said, would be to license him to speculate, by abusing his situation. His duty obliges him to communicate all information, and to exert all the care and industry necessary to dispose of the estate as advantageously, for his *cestui que trust*, as if he were selling it for himself. His interest would sometimes thwart his duty, and the infirmity of human testimony would render it impracticable, at all times, to prove its violation; hence the policy of the rule which divests him of a legal capability to purchase. In its correctness, when not carried to too great an extent, I most cordially acquiesce. I admit its wisdom, when applied to a purchase by an agent, at a sale by himself, of his principal's property, and to other purchasers under the same circumstances; but I must repudiate its application in the case I am considering.

The rule, with reference to a purchase by an administrator, has been frequently considered, both in the English and American courts. By the former, it has been held to apply in all its strictness. The case of *Fox v. Mackreth*, noticed in 2 Brown's Chancery Cases, 400, which seems to have engaged a full portion of the time of the court of chancery and the house of lords, goes the entire length. The case of *Crowe v. Bullard*, 3 Bro. Ch. C. 117; the cases of *Campbell v. Walker*, 5 Ves. jun. 678; *Ex parte Reynolds*, Id. 707; and *Ex parte Hughes*, 6 Id. 707; and *Lister v. Lister*, Id. 631, are to the same point. It is worthy of remark, that in only one of these cases was the sale at auction.

The reasoning on which the rule is founded, inclines my mind to the opinion, that it does not extend to a purchase by an administrator, at a sale made by himself of his intestate's estate; or, that, if it extends to such purchase, it can not be considered as applying, where the sale was made fairly. Let the case be examined by an application of this criterion to the facts on the record. Mary Ann Brannan, one of the appellants, and the mother of the appellee, administered on the estate of her husband, the father of the appellee, in South Carolina, where

he died, and before his death resided; and after the grant of the letters of administration, she sold the negroes mentioned in the appellee's bill at public auction, without an order of the court of ordinary, purchased them herself, for anything appearing to the contrary, at a full price, and made a return of the sale to the proper court.

These facts develop no unfairness in the purchase by the appellant, Mary Ann. The idea of unfairness is repelled by the circumstance that the sale was not made privately, but openly, where all persons who wished had an opportunity of bidding. There is no allegation in the bill that the slaves were sold at an under price, and there is no proof that such was the fact. It is not alleged that the slaves were not sold pursuant to the laws of South Carolina; nor is there anything on the record, from which such a conclusion can be legitimately deduced. If the laws of that state do not tolerate a sale made in the manner this was, it should have been shown by proof what formalities the law required there to make it legitimate. In the absence of proof upon this point, the court can only look to the common law to aid it in its determination, and suppose that it has been adopted in South Carolina as the governing rule on this topic. What says that system of jurisprudence? That an administrator may sell or otherwise dispose of his intestate's personal estate, accountable, however, for a correct discharge of his duty in this particular, and for an honest application of the proceeds. This sale may be made privately without a license from court. The law under which he receives his appointment confers the license, and makes him answerable for its abuse: *Toller's Ex'rs*, 133, 240. Had the appellant designed to defraud the appellee, and by that means derive a benefit to herself by a purchase of the slaves of her intestate, would she not, under the circumstances, have acted differently? It can not be true that she would have exposed the slaves for sale publicly at auction; or, if she had, she would never have returned to the court an account of the sale. Had she intended to act dishonestly, and disregarded that moral duty she owed to the creditors and distributees of her intestate's estate, as well as to her securities for a correct administration of the estate, it would not have been difficult to have acted otherwise. It is beyond the power of the human mind to fathom her intentions; but be they what they may, there is nothing in the record which manifests an unfairness of fact or intention, and it would be against a settled and charitable rule of law, gratuitously to presume it.

Let us examine the reasoning of the rule which maintains the invalidity of a purchase by an agent or trustee, with a view to ascertain if it embraces the case we are considering. The great difficulty of discovering a disregard of the rights and interest of the *cestui que trust*, induced the determination of the courts, that the trustee had no right to purchase, so long as his vicarial character continued. There, the only means in almost every instance, to ascertain unfairness in the sale, was by such communication as the trustee might think proper to make; and it is unreasonable to suppose that he would make any disclosure which would operate adversely to his interest; even when called on in equity, to answer on oath, if he was convinced that a knowledge of the facts was inclosed within his own bosom. How widely dissimilar is the case made out by the facts here! The administratrix sells at public auction the property of her intestate, where all who wish to purchase have an opportunity of doing so; she returns an account of the sale to the court, from which she receives her authority, and it is there recorded. If there was any unfairness in such a sale, the testimony of those who were present (and some persons must be, or the sale can not be public), and the records of the court, would, I may venture to say, in forty-nine fiftieths of the cases, disclose it, without depending alone upon the answer of the purchaser in equity. Hence, I conclude, from the publicity of the transaction, that the rule, when extended to a case like the present, is not sustained by just notions of policy, and that an administrator may purchase at a sale made at public auction, under legal authority of his intestate's estate.

The authority furnished by the English and many of the American decisions, in favor of an extended application of the rule, can not be received as conclusive or pertinent in those states where administrators dispose of their intestate's estates by a public sale, authorized by a special license from a court of record, or where they make a return of such sale to the court. These decisions are predicated upon a different state of fact. There the grant of administration is a license to them to perform whatever pertains to them in the character of administrator, and dispenses with a special authority. There the sale is good, though made privately; consequently, sales made by administrators under such circumstances, are less public, and the probability of detecting a fraud greatly diminished.

I understand the rule to be founded upon the idea that the purchase is a fraud in law upon the rights of those interested in

the estate. I consider it as most congenial with the condition of society and the character of human dealings, to narrow the catalogue of legal frauds to as few as practicable, and to declare no act as fraudulent *per se*, where a wise and just policy does not imperiously demand it. Every lawyer who is not too much enamored with his early notions of law, will admit that the benefits which result from an extension of the doctrine of constructive frauds bears no comparison with the injury it inflicts. I introduce this view merely to show that the rule should not be held to extend to all cases of trust.

I will now notice some authority in favor of the right of the administrator to purchase. In *Lindsay v. Lindsay, administrator*, 1 Desau. 150, the court of chancery, in South Carolina, determined in favor of the sale and purchase by the administrator. Another case in the same book is to the same point: *Drayton's Exrs. v. Drayton et al.*, 567. In *McGuire and wife and others v. McGowan and wife, administratrix*, 4 Desau. 487, the same court seem to treat the subject as if it was still an open question. Two of the judges were in favor of the general authority to purchase; one of them, though he did not concur in the general authority of the administrator to purchase, held that the trust being coupled with an interest in the particular case, he might be permitted to purchase; the other two judges maintained the broad principle of incapacity. In *Perry and wife v. Dixon*, Id. 504, note, the judges seem to have been divided, as they were in the case of *McGuire and wife and others v. McGowan and wife, administratrix*. The inference deducible from these decisions is, that an administrator, where he has an interest in the estate, may purchase, but where he has a mere naked trust he can not. The case we are considering comes within the rule as thus modified. The appellant, as the relict of her deceased husband, was entitled to one third of her husband's estate, and the appellee, as sole heir and distributee, to the remaining two thirds. Without bending the strict rule further than it has been made to yield in the cases in 4 Desaussure, it was competent for the appellant to have purchased.

In *Anderson and Starke v. Fox and others*, 2 Hen. and Munf. 245, the question as to the right of an executor to purchase property exposed to sale by himself, was discussed. Judge Tucker, in the opinion which he delivered, remarked that he was by no means prepared to say that as to such purchase the executor was a mere trustee. "If this court," said he, "were to declare the law to be such in all cases, even where there was

an undoubted deficiency of assets, and although the sale should have been made after due notice at public auction, and with all possible fairness, it would probably be the immediate parent of a thousand suits in chancery to set aside such purchases, either in behalf of the legatees, distributees, or creditors." Again, "The practice has been too general in this country, and has prevailed too long, to be drawn in question by analogy to the doctrines in England concerning trustees of lands or commissioners of bankrupts. For though executors and administrators are, to many purposes, considered as trustees in a court of equity, they are not so in all cases:" 2 Ves. 482. Judge Roane deemed it unessential to a decision of the case to express an opinion upon the question, rather intimating, however, that the English decisions did not conflict with the usage and understanding which prevailed in Virginia upon the subject. The opinion of Judge Tucker has ever since been considered as correctly ascertaining the law in Virginia.

The remark of Judge Tucker, as to the generality of the practice of executors and administrators in Virginia purchasing at sales of the estates they represented, will apply with equal force to this country, and the injury consequent upon a decision in opposition to usage, would be alike incalculable. Under these circumstances, nothing but rules of law too inflexible to yield to considerations of general convenience should superinduce such a determination. Where rights have matured under a general impression that they were sustained by law, such impression should not be lightly regarded. And in cases where the adjustment of the law is more important than in what way it be settled, it should receive a controlling influence: *Jones v. Logwood*, 1 Wash. 42; *Colhoun v. Snider*, 6 Binn. 153; *Waters et al. v. Stewart*, N. Y. Cases in Error, 47.¹

In 2 Carolina Law Repository, 49, the general authority is maintained with this restriction, that the personal representative shall be answerable to the creditors to the full value of the property. And in *Tomlinson's ex'rs v. Detestitatus' ex'rs*, 2 Haywood, 284, it is held that an executor may purchase the property of his testator at a public sale by order of court.

Having shown that there is little danger of unfairness in the sale passing undetected where it is made publicly, I proceed to consider whether a just policy does not require a relaxation of the rule in such cases. It is certainly for the interest of the creditors and distributees that the estate should yield, when sold, as

1. 1 *Caine's Cases in Error*, 47.

large a sum as practicable; and as the surest means to effect that result, a fair and honorable competition should not only be tolerated, but encouraged. The widow or some near relative is most frequently the personal representative, and most solicitous to purchase some particular portion of the intestate's estate; and if not permitted to purchase by openly bidding, would procure some one to become the ostensible purchaser, and acquire through him the ownership. If this can be done, and it is beyond the operation of human laws to restrain it, without inhibiting to an impolitic extent the transfer of property, why declare that the administrator shall not be permitted to purchase? The rule when extended to such a case can produce no good, since, by a kind of tacit understanding, which the law can not reach, he can acquire title through another. Surely, reason and good sense demand that he should be permitted to do that directly which he can do indirectly; and when too, if there is unfairness in the sale, detection is almost inevitable.

This course of reasoning has brought my mind to the conclusion, first: That the purchase by the administratrix is *prima facie* valid, because divested of all unfairness; second, That the sale is *prima facie* legal, because it does not appear what the law of South Carolina is. Without, therefore, expressing an opinion upon the other assignments of error, I am of opinion that the decree should be reversed, and the cause remanded, that an opportunity may be given to show the law of South Carolina; and with me the court concur.

Reversed and remanded.

The CHIEF JUSTICE, and Judge CRENSHAW, not sitting.

PURCHASE BY TRUSTEE.—It is well settled that a trustee cannot purchase at his own sale, either in person or by another, but that a sale made to himself of the trust estate is invalid and will be vacated and set aside upon application by the *cestui que trusts*. The same rule applies to purchases by administrators, or for their benefit, of the property belonging to the estate which they represent, inasmuch as the position they occupy is fiduciary in its nature: *Dorsey v. Dorsey*, 6 Am. Dec. 506; *Singstack v. Harding*, 7 Id. 669; *Davis v. Simpson*, 9 Id. 500. Such sales, if not made in the name of the administrator, though for his benefit, are not absolutely void so that the same may be assailed by third persons, but they may be acquiesced in and affirmed by those who are beneficially interested in the trust estate, and if so affirmed, they are as valid and binding as though they had been made to third persons. For what acts constitute an affirmation of sales by a trustee to himself of the trust estate, and also for a general discussion of this subject, see *Van Dyke v. Johns*, 12 Am. Dec. 85, note. The principal case is very unusual in its character. The sale was made apparently without any order of court. Had any conveyance been required, the administratrix must have appeared therein both as

grantor and as grantee. The transaction was not one apparently valid and innocent on its face; and in sustaining it, we think the court went farther than is defensible, either upon reason or authority: See note to *Van Dyke v. Johns*, 12 Am. Dec. 85; Freeman on Void Judicial Sales, sec. 33.

LUCAS v. HICKMAN.

[2 STEWART, 111.]

WRIT OF *NE EXEAT* WAS ORIGINALLY never granted if the demand was actionable at law, but it was finally determined that in proceedings where courts of law and equity have concurrent jurisdiction, if the defendant had not been held to bail, the writ would be granted to aid and render effectual the action at law.

DEMAND BEING EXCLUSIVELY of an equitable nature, and the defendant being about to leave the State, the writ of *ne exeat* issues as of course.

BILL in equity for a *ne exeat*. It appeared that an action at law was commenced for the benefit of complainant against Pope and Hickman to recover the amount due on a promissory note, signed by the latter as partners and indorsed to Lucas. The bill averred that Pope was insolvent, and that Hickman was a resident of Lawrence county and well able to pay the amount sued for. That the action on the note was still pending, and that Hickman was about to remove himself and property to Tennessee. That he had removed most of his personalty and sold his realty, and had declared his intention to entirely remove from the state. That unless aid was granted him by the issuance of the writ of *ne exeat*, any judgment that might be recovered would be ineffectual. The writ was issued in vacation, and on defendant's motion at the November term, 1827, the bill was dismissed.

Kelly and Hutchison, for appellant.

Hopkins, contra.

By CRENSHAW, J. Where the action is purely legal, as ancillary to an action at law, it may be laid down as a rule generally correct that equity will not interfere.

In the case of *Seymour v. Hazard*, 1 Johns. Ch. 1, it was settled that the writ of *ne exeat* will not be granted for a debt due and recoverable at law; and that the writ was applicable only to equitable demands due in the nature of a debt.

In the case of *Porter v. Spencer*, 2 Johns. Ch. 169, the same principle was recognized as being the uniform law, at least down to the time of Chancellor Eldon. In that case it is

said that the writ would be denied if the demand was actionable at law; though the party was about to remove with his effects beyond the jurisdiction of the court. Since the time of Eldon, however, the law seems to have undergone some change, and it is now well settled in the English chancery that in cases where the courts of law and equity have concurrent jurisdiction, and the defendant has not been held to bail in the action at law, the writ will be granted in aid of and to give effect to the action at law.

The case of *Porter v. Spencer* was indeed a peculiar and strong one for the interposition of a court of equity. The action at law had been brought to recover the balance of an account; the defendant had been held to bail, and he and his bail were about to remove from the state permanently, without leaving any property behind. The chancellor hesitatingly granted the writ on the ground of the necessity of the case, and to prevent a failure of justice. I think it obvious that the legislature of this state, by the act of 1823, did not intend to authorize the granting of writs of *ne exeat* in cases where the debt or demand was purely legal. The ninth section of the act provides "that it shall be lawful to grant writs of *ne exeat*, not only in cases where a sum of money is due, but also where the complainant has an equitable claim or demand against the defendant."

Before the passage of the act it must have been considered that the writ of *ne exeat* could issue in cases only of an equitable nature, in which it was also necessary to swear to a sum certain; it seems to have been doubtful whether the writ could issue where the party could not swear that a sum certain was due, though the demand was equitable in its nature. This doubt the legislature intended to remove by the enactment of the law, and now authorizes the writ to be granted in all cases of an equitable nature, whether a sum certain be due or not.

From what has been said, the following propositions are clearly deducible: 1. In cases where the defendant is about to remove beyond the jurisdiction of the court, and the demand is exclusively of an equitable nature, whether a sum certain be due or not, the writ of *ne exeat* will be granted on a sufficient affidavit; 2. Where the courts of law and equity have concurrent jurisdiction, if the defendant is about to remove, and has not been held to bail in the action at law, the writ will be granted in aid, and to give effect to the action at law; 3. Where the two courts have concurrent jurisdiction, and no action has

been commenced at law, but suit has been instituted in equity, the writ will be granted if the party is about to remove; 4. Where from the extreme necessity of the case, and to prevent a failure of justice, it becomes necessary, it also appears that the writ will be granted. But this fourth proposition, though it seems to be sanctioned by authority, I have some hesitation in admitting to be law. "Extreme necessity, and to prevent a failure of justice," appears to me to open a door too wide, even for the chancellor's discretion, and which in many instances may be liable to abuse.

In the case before us it does not appear that Hickman was removing with an intention of evading justice, or of defeating the operation of the judgment which might be obtained at law; and though removing out of the jurisdiction of the court, it yet may have been his intention to pay the debt after the cause should be entirely settled. His removal to a place not distant, and where it would be nearly as convenient to pursue him with the judgment as to bring suit here against his bail, can not of itself furnish sufficient ground for equitable interposition.

In the foregoing opinion the court are unanimous.

Decree affirmed.

The history of the writ of *ne exeat* is discussed and commented upon at length in the note to *Gibert v. Cole*, 14 Am. Dec. 560.

KING v. GREEN.

[2 STEWART, 133.]

ADMINISTRATRIX MARRYING THE OBLIGOR IN A BOND payable to her, in her representative capacity, does not thereby extinguish the debt, but merely suspends the right of action during coverture and while she continues administratrix.

BOND, PAYABLE TO AN ADMINISTRATOR as such, is assets in the hands of an administrator *de bonis non*.

JUDGMENT RENDERED IN VACATION and entered as of the preceding term is valid, if such entry was in accordance with the agreement of parties entered in open court.

DEBT. King, administrator *de bonis non* of the estate of John Bass, deceased, brought this action against Green, Holliday and Welsh, to recover the amount due on a sealed note made by them. Said parties executed the note to Julian Bass the administratrix and M. Holliman administrator of John Bass, deceased, promising to pay them as such representatives the note

in twelve months from the date of the same. Subsequently Julian Bass intermarried with the defendant Green, and in May, 1825, plaintiff succeeded to the administration of said estate, as administrator *de bonis non*. Defendants filed a general demurrer, and it was agreed that the cause should be argued at the Bibb circuit court, and that the judgment should be entered as of the November term of Perry court. In November the judge's decision sustaining the demurrer was filed, and judgment was rendered in favor of defendant.

H. G. Perry, for appellees.

Barton and Stewart, for appellant.

By WHITE, J. In the opinion of the judge who presided in the court below, and which is filed of record, the case is assimilated to one where, in a note given to an administrator, he becomes security for himself. In England, when a creditor appoints his debtor executor, when his own creditors will not be injured, and there is nothing expressed in the will to the contrary, it will operate as an extinguishment of the debt, on the principle that from such an act of the testator, it may reasonably be inferred, that such was his intention. In that case, the party himself acting in his own right, having destroyed the remedy, it is forever gone. But it is otherwise where administration of the estate is committed by the act of the law to a debtor. There the remedy is only suspended for a time, by the legal operation of the grant. Thus, if the obligor of a bond administer to the obligee, and die, a creditor of the obligee, having obtained administration *de bonis non*, may maintain an action for such debt against the executor of the obligor. So, if the executrix of an obligee marry the obligor, such marriage is no release of the debt, and the husband may pay it to the wife in the character of executrix; and if he do not, the remedy is suspended only by the legal effect of the coverture; and on her death, the administrator *de bonis non* of the testator will be equally entitled to that debt, as to any other outstanding: Toller on Ex'rs, 272, 273. In the first volume of Chitty's Pleadings, it is said, vol. 1, p. 22, that if an executrix marry a debtor to her testator, the right of action is only suspended during the coverture, and if she survives, she may, in the character of executrix, sue the representatives of the husband, as the wife surviving is entitled to all actions in *auter droit*. From these principles it results, that if the bond on which this action is founded must be esteemed assets in the hands of the administratrix, or in other

words, if she held it in *auter droit*, then her marrying one of the obligors would only suspend the remedy, but not destroy the right. In the book last cited, page 13, it is expressly laid down, that an executor may sue as such, upon a contract made with him in that character, as for goods sold by him as executor, and in other cases where the sum to be recovered would be assets. Other authorities might be adduced to the same points, not only that in such cases he may sue as executor, but that the price of goods sold by him, in the character of executor, are assets, and if this will hold in England, it is more especially true in this state, where executors and administrators are not only permitted, but required to sell the perishable estates of decedents upon credit. Bonds and notes, therefore, taken at such sales, would be held by them, not in their own right, but as assets, in the right of others. And hence, upon their death, resignation, or removal, such notes or bonds would pass to those intrusted with the further administration, as part of the estate unadministered. It follows as a fair deduction from what has been said, that in the present action, one of the obligees, who was administrator, having married an obligor to the bond sued on, which bond she held as assets, the remedy was merely suspended, and not destroyed, as if it had been held in her own right, for her own benefit. And this suspension of the right to sue would have continued during coverture, but for her resignation and the appointment of another to finish the administration. When this was done, this disability was removed, the right of action restored, and, as we conceive, properly asserted and fairly sustainable.

But it is said the judgment is of a character that the writ of error can not be prosecuted, and should be dismissed. We are of different opinion. The record shows that by agreement, the judge took the papers, decided the case in vacation, and having returned them to the clerk, a reference was had to his determination, and a judgment was entered, not exactly in form, but, as we conceive, sufficiently so to be reversed, if erroneous, and we believe it was erroneous.

The judgment must be reversed, and the cause remanded.

GATES v. McDANIEL.

[2 STEWART, 211.]

PENAL STATUTES should be strictly construed.

PRIVILEGE OF COLLECTING TOLLS, WHEN SECURED IN EQUITY.—An injunction will be granted to secure a party in the enjoyment of a privilege conferred by statute, of which he is in the actual possession, his legal title being unquestioned. Hence, one maintaining a public ferry and collecting tolls, may enjoin another from having a free bridge near it for the use of the public.

BILL in equity. Gates conducted a public ferry on the Conecuh river, having obtained permission from the county court for that purpose. The bill charged that defendants had erected a bridge on their land across the river over which the said ferry crossed, very near the latter, and that all persons were allowed to cross the bridge free, by reason of which the profits of the ferry were entirely lost. It appeared that upon application to the county court the defendants had been refused permission to erect a bridge across said river. An injunction was issued restraining the defendants from using the bridge for any other purpose than the convenience of their own families, but on motion it afterwards was dissolved and the bill dismissed, with costs, because the statute prohibiting the establishment of ferries within two miles of a ferry already established, did not embrace bridges; and also that it contained an exception as to ferries at or near a town.

Shortridge, for appellant. The bridge was both a public and private nuisance. It was a public nuisance because it was unauthorized by law, and it obstructed the Conecuh river, which was by statute a navigable stream and public highway: Laws of Alabama, act of 1821, 717; *Id.* 397. It was a private nuisance because it destroyed the profits of the plaintiff's ferry, on which he had a legal vested right: 3 Bl. Com. 219; 2 Roll. Abr. 140; 1 Hayw. 457; *Croton Turnpike Co. v. Ryder*, 1 Johns. Ch. 611; *Corning v. Lowerre*, 6 Id. 439; *Livingston v. Livingston*, Id. 497 [10 Am. Dec. 353].

Vandegraaff and Parsons, contra.: Co Lit. 115; *Arundel v. McCulloch*, 10 Mass. 71.

By TAYLOR, J. The statute of 1820, section 17, provides: "That no public ferry shall be established within less than two miles by water, of any ferry already established, unless on any river at or within two miles of any town." And by the twen-

tieth section of that act, it is declared: "That if any person or persons shall establish a public ferry or a public road, toll bridge, or causeway, contrary to the provisions of this act, he or they shall forfeit and pay five hundred dollars," etc. The meaning of this last section clearly is, if a toll bridge, etc., should be established without an order of court, then the forfeiture shall be incurred. But as this is not a toll bridge it does not come within the words of the statute, which is penal, and must be strictly construed.

What is the reason that persons are prohibited from establishing a public ferry within two miles of another? Clearly because the owner of the first has entered into onerous engagements when he obtained the order to establish his ferry. He has become bound to keep good boats, constant attendance, etc. This requires that he should receive compensation, and it is important to the community that he should observe faithfully the engagements he has entered into. Unless he has some such protection, his ferry will become profitless, of course will be neglected, and travelers and others meet with great delays. But will the object of the general assembly in affording this protection be defeated by the erection of a bridge within the prohibited distance? Certainly much more effectually than by establishing a ferry. It is said, though, that in the record there is some showing that this place came within the exception, as there was a town where this bridge is built. I am far from being satisfied that there was a town within the meaning of the act; but it is a sufficient reply to this objection, that this bridge was not established by order of the county court.

Apart from all statutory provisions, except those which relate to the establishment of the ferry, I am decidedly of opinion that the defendants had no right to build a public bridge within the immediate vicinity of the ferry calculated to destroy the profits of the ferry. The complainant had regularly made his application to the county court, entered into bond as the law directs, and was liable to be sued on that bond if he failed to comply with its conditions; certainly then he must receive the protection which he had a right to expect when he gave this bond, and without which it will not be in his power to fulfill its conditions. In a case reported in 1 Johnson's Ch. 611, it is determined that "an injunction will be granted to secure to a party the enjoyment of a privilege conferred by statute, of which he is in the actual possession, and when his legal title is not put in doubt. As when a turnpike company, incorporated

with the exclusive privilege of erecting toll-gates and receiving toll, had duly opened and established the road with gates, etc., and certain persons, with a view to avoid the payment of toll, opened a by-road near their turnpike, and kept it open, at their own expense, for the use of the public, by which travelers were enabled to avoid passing through the gates and paying toll to the plaintiff; the court granted a perpetual injunction to prevent the defendants from using, or allowing others to use, such road, and ordered the same to be shut up. See, also, 1 Hayw. 457." This case is so precisely in point that it is needless to comment upon it.

The decree of the court below must be reversed, and this court proceeding to render such decree as should have been rendered below, it is ordered, adjudged, and decreed, that the injunction be reinstated and perpetuated, and that the defendants pay the costs of the suit.

Judge CRENshaw not sitting.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

WINN v. YOUNG.

[1 J. J. MARSHALL, 51.]

NEW TRIAL GRANTED, OWING TO MISCONDUCT OF APPLICANT'S COUNSEL.—

If a client's rights have been wantonly or inadvertently jeopardised by his counsel, the court may afford relief by granting a new trial.

COVENANT. Writ of error to the Clarke circuit.

The opinion states the case.

Monroe, for plaintiff.

By Court, ROBERTSON, J. On the fifth of March, 1825, Wm. Winn filed, in the clerk's office of the Clarke circuit court, his declaration in covenant against John Young, on the following written covenant:

"I promise to pay unto William Winn, son to James Winn, of Clarke county, when he shall arrive at the age of twenty-one years old, one hundred dollars, with legal interest thereon, for value received, as witness my hand and seal this second day of October, 1817.

"Attest: THOMAS WARREN.

JOHN YOUNG." [Seal.]

The defendant having filed two pleas, denying that the defendant was twenty-one years old, and denying notice of the fact, on which issues were taken, a jury was sworn to try the issues; on the trial the plaintiff moved the court to instruct the jury, that they should find for him interest from the date of the note, which being objected to, the counsel for the plaintiff and the judge concurred in a suggestion which was made, that it

would be safest to calculate interest only from the time when the plaintiff attained legal maturity; and accordingly the plaintiff's counsel thereupon made the calculation by this standard, and the jury, without retiring from the bar, found a verdict for the amount of principal and interest as thus computed by the attorney.

After the verdict was rendered, the attorney for the plaintiff moved for a new trial, on the ground that the verdict was for too small a sum. But the court overruled the motion, and gave judgment on the verdict.

There can be no doubt that the plaintiff was entitled, by the contract, to interest from the date of the note. The language employed is susceptible of no other rational or consistent construction. It would be absurd to suppose that a note for the payment of money on a particular day, with interest, could be construed to mean that the interest should commence on the day of payment, and not before, for the law would give interest from that time. It is perfectly evident that in this case, interest was payable from the date of the note, and consequently the plaintiff was entitled to a verdict for the principal and interest calculated from that time. As the verdict was for a less sum, it was erroneous. And we can not believe that the mistake or inadvertence of the counsel in such a case should debar the plaintiff from asserting his rights. The verdict was not the result of a compromise of doubtful claims. The plaintiff's right to interest from the date of the note was clear, and the verdict resulted from the mistake of his attorney, which was produced in some degree by the suggestion of the judge; and we should doubt the power of an attorney to compromise the rights of his client by any such act, whether wanton or inadvertent. At all events, this mistake should not have any more effect than the very common errors in calculating interest on notes in jury trials, committed or assented to by the attorney. The verdict is for less than the plaintiff's covenant entitled him to. He had a legal right to the whole sum, compounded of principal and interest from the date of the note, and the verdict ought to have been set aside, and a *venire facias de novo* awarded.

Wherefore, the judgment of the inferior court is reversed, with costs.

ROWLAND v. GARMAN.

[1 J. J. MARSHALL, 76.]

RESCISSIION, WHEN DECREED.—A purchaser has no right to rescind a contract for the purchase of land, because it was not reduced to writing, if the vendor has complied with his contract, or is willing to do so.

PROPER PARTIES HAVING BEEN OMITTED from the bill intentionally for the purpose of giving the case a more specious semblance of equity, the bill will be dismissed without prejudice.

BILL in chancery. Error to the Warren circuit. The opinion states the case.

Thomas B. Monroe, for defendants in error.

By Court, **ROBERTSON, J.** Although the bill alleges that the contract for land, which it seeks to rescind, was not reduced to writing, the only defendant before the court refuses to admit it, and the complainant has taken no proof; but if it be conceded that the contract was parol, it does not follow that the chancellor will, for that cause alone, decree its rescission; unless it be reduced to writing, conformably to the statute of frauds, no suit can be maintained on it, if the fact of its not having been written appear, nevertheless it may be good between the parties under some circumstances, and for some purposes. The chancellor will never interfere and relieve one party from it, if the other has complied with his contract, or is willing and able to do so. If the vendor is not delinquent, the purchaser has no right in equity to a rescission. A court of chancery will not lend its aid to the perversion of justice on the petition of the party in fault.

In this case it is evident that Garman did not sell the legal title, and was never expected to convey it, but that the son of the complainant, Rowland, who held the title, was to make it to the appellants. And it not only does not appear that there was any inability or unwillingness to convey, but it is quite clear that the appellants might have obtained the title. It is equally plain that they do not desire to obtain it. They have never applied for it. They have not made the holder of it a defendant, nor have they had publication made against the vendor of Garman, who is a non-resident. Their only object seemed to be to enjoin the payment of the purchase merely until "a more convenient season."

If all the parties had been before the court, the decree should have been as it was, unless it had been made to appear that Garman was bound by contract to make the title, and that the

holder of the title was unable or unwilling to convey; but as the proper parties were not before the court the absolute dismissal of the bill was erroneous.

If, under a different aspect, this court might, in reversing for want of parties, leave the case open on its return, nevertheless, as the complainant below seems to have intentionally failed to make the proper parties, for the purpose of giving to their case a more specious semblance of equity, and of preventing a clear disclosure of their want of title to relief; and as nothing which has been made to appear indicates a probability that their case was or could be made a meritorious one, the decree must be reversed, and the case remanded, with instructions to dismiss the bill without prejudice; and each party must pay his own costs.

ROBERTSON, J., sitting alone, by consent, delivered the opinion.

Petition for rehearing overruled.

RESCISSIO, WHEN DECREED.—In the note to *Hough's Administrator v. Hunt*, 15 Am. Dec. 572, the rescinding of contracts in equity, in the absence of fraud, accident, or mistake, is discussed at length; see, also, *Warner v. Wheeler*, 6 Id. 717. A contract partly executed by one of the parties can not be rescinded by the other, and the money paid thereon recovered: *Stevens v. Cushing*, 8 Id. 27.

FISHBACK v. WOODFORD.

[1 J. J. MARSHALL, 84.]

FRAUD OR MISTAKE IN THE EXECUTION of a written contract may be proved by parol, but such fraud or mistake should be alleged in the bill, and clearly proved.

EVIDENCE OF A DIFFERENT CONSIDERATION than the one expressed in the writing is not sufficient evidence of fraud or mistake to avoid a contract. There must be some substantive fact established independent of the consideration, before the contract will be set aside.

PROOF OF PAPER CONSIDERATION OF A NOTE for dollars, does not *per se* prove a mistake or fraud.

BILL in chancery. Error to the Clarke circuit. The opinion states the case.

Hanson, for plaintiff.

Depew and Barry, contra.

By Court, ROBERTSON, J. The appellants, as administrators of Jacob Fishback, deceased, sold at auction the personal estate

of the decedent, in October, 1821, and among others who purchased at the sale, the appellee bought property to the amount of one hundred and one dollars and twelve and one half cents, and executed his note, with security, at twelve months' credit, for one hundred and one dollars and twelve and one half cents.

Judgment being obtained on this note against the appellee, he filed his bill in chancery for an injunction and final relief, charging that the sale was for the commonwealth paper, or the common currency of the state; and that this was the general understanding of the purchasers and others at the sale, was announced as one of the terms by the crier, and frequently repeated during the sale by the administrators; that the property which he purchased at the sale was high, even in bank paper, which was the only medium then in general circulation, and that the note, was "inadvertently" drawn for dollars. The answer admits that the administrators received paper of some other purchasers, on the day of sale, and of others, when their notes became due, at the rate of exchange at the time of sale; but denies that the sale was for paper, or that there was any mistake or inadvertence in the drawing or execution of the note.

Many depositions were taken, exhibiting some contrariety of facts and opinions; but there is a decisive preponderance in numbers as well as in the intrinsic probabilities attested, in favor of the allegation that it was the general understanding that the property was selling for current paper. Many witnesses swear that the crier stated publicly, during the sales, that they were for the common currency, but that gold or silver would not be refused. Others, on the same side, swear that the administrators said, during the sale, that it was not for specie, but for the common currency. This, however, is not proved to have been published generally. For the administrators, sundry persons who were at the sale, swear that they heard no suggestion from any person that the sale was for paper; that they heard the administrators reply to inquiries made on that subject by individuals, that they could not make any agreement which could compel them to receive depreciated paper; but that they would receive whatever would pay debts and satisfy the distributees. These are the prominent facts exhibited in the testimony. Other subordinate circumstances are proved which have some influence on the principal facts; but it is useless to extend this opinion by recapitulating them. There is no discrepancy in the various opposing depositions, which can not be reconciled. The

facts proved by the administrators are chiefly negative, and do not essentially conflict with the affirmative facts established by the appellee. An analysis of the facts contained in each deposition would clearly show that there is nothing irreconcilable in the testimony. We are well convinced that the appellee, and a large majority of the persons at the sale, understood that it was for current paper; and we have as little doubt that this understanding was authorized by the crier and administrators. We believe, too, that the administrators stated to many who individually applied to them, that they could not be bound to receive paper unconditionally. And, from all the circumstances, we are bound to believe that the administrators were willing that the impression should be made on the crowd that the sale was for paper, to enhance the amount of sales; and perhaps connived at suggestions by the crier and others, which had a delusive effect; intending, if possible, to have it in their power either to receive the paper, or to coerce specie on a replevin of two years; and we believe that this was the understanding of some of the witnesses.

The circuit court perpetuated the injunction for one half of the amount of the note, which was the ratio of depreciation, when the note became due. This decree seems to accord with the abstract justice of the case. But general principles of equity and fixed rules of law being indispensable to the wholesome administration of justice, if the decree can not be sustained, without relaxing or violating some of them, it must be reversed; and if this shall be the case here, we shall only see another illustration of the maxim, everywhere and every day exemplified, that the general good is secured at the expense of individual hardship. We have never doubted that parol evidence is competent to prove fraud or mistake, in the execution of any written contract. We are only surprised that for years past it should have been deemed necessary by court or lawyer to employ argument or cite authorities to prove a doctrine so well and so long established. The case of *Inskoe v. Proctor*,¹ contains nothing new. Its principles had been so well understood, that in the previous case of *Baugh v. Ramsey*,² the court seem to consider them too plain to need the support of reasons or cases. We know of no case in modern jurisprudence, in which any enlightened chancellor has refused relief against a writing, in the execution of which fraud or mistake had been established. But must not the fraud or mistake be alleged and

1. 6 T. B. Monroe, 311.

2. 4 T. B. Monroe, 155.

clearly proved? Public policy and private security require, that on appropriate allegation to let in parol proof, that proof should be very strong and clearly convincing.

There is no allegation in this bill, of fraud in the procurement of the note; nor is any mistake in its execution distinctly averred. We are willing, however, to allow, that by the expression "inadvertently drawn," mistake is intended and may be understood. But the mistake or fraud must be in the execution of the note. It is not proved that the language or import of the note was not well understood; or that either was different from what was intended by the parties, when it was written and signed. Proving the consideration, as is satisfactorily done in this case, might conduce very forcibly to confirm slight circumstances, tending only remotely to the establishment of fraud or mistake, and which circumstances, without some subsidiary fact, would be clearly insufficient. But evidence of a paper consideration, however clear and conclusive, does not *per se* prove a mistake or a fraud, in the execution of the note given on that consideration for dollars or money. There must be some substantive fact established, independent of the consideration, before the chancellor can set aside or modify the legal import or effect of a solemn written contract. If an obligor understands the language and effect of a note when he signs it, and executes it willingly, and without being seduced by the fraud of the obligee, he ought not to be—he never is—permitted to dispute or deny its obligation, according to its rational and legal construction. In such a case there is no fraud, and certainly no mistake; and parol evidence can not resist, alter, or control the writing, which is the highest evidence of the contract.

In this case the subscribing witness has not proved that the note was not drawn as it was directed to be drawn, or that it was not understood as drawn, or that there was any expectation when it was signed that the word dollars, without the adjunct "in specie" or "commonwealth paper," would mean paper. There is no proof whatever of any mistake in the execution of the note, except what is furnished by evidence of the consideration. It is not proved that the word "dollars" at the date of the note was understood by the people generally, or by the contracting parties, to mean paper or specie dollars indifferently; so as to show, by proving this equivocal popular import of the word, when used in contracts at a particular period, and in a peculiar place, that it did not necessarily mean, when inserted in a note, specie dollars, and that, therefore, proving by parol

evidence clearly that the consideration was paper, might not contradict or detract from the note. Nor has it been proved, that at the date of the note, when contracts were made for specie, they were literally so expressed; nor, indeed, has any circumstance in aid of the relief sought, been attempted to be proved, except that the sale was for paper. To what extent other proof might operate we can not judicially predetermine; it is enough that it is wanting in this case. Cases like this are seldom, if ever, skillfully prepared, and are generally lost for want of proper preparation. It would not often happen, that specie could be coerced on a note founded on a paper consideration, if all the facts which might be averred and proved were properly presented. But we must decide on cases as they appear on the record before us; and in doing so, we must adhere to general and fundamental principles, on the inflexible application of which depend the rights of the people. We must decide the law as we understand it; and by applying this test to the case before us we are constrained to reverse the decree of the inferior court and remand the case for a final decree, dissolving the injunction and dismissing the bill.

Petition for a rehearing overruled.

INADEQUACY OF CONSIDERATION, or proof of a different consideration than the one expressed in the deed, does not of itself establish such fraud as will justify a court of equity in decreeing the rescission of a contract, but the same may be considered in connection with other facts; and if, when so considered, the contract is determined to be fraudulent, the relief may be decreed. See the note to *Seymour v. Delancy*, 15 Am. Dec. 299, where this question is considered and the decisions reviewed.

RECITAL OF PAYMENT in a deed, as a general rule, is not conclusive, but may be contradicted by parol evidence: *O'Neale v. Lodge*, 1 Am. Dec. 377, note; *Schemerhorn v. Vanderheyden*, 3 Id. 306, note; *Graves v. Carter*, note, 787; *Chiles v. Coleman*, 12 Id. 401. There is one exception to the rule as stated, and that is, that parol evidence is never admissible, except where fraud intervenes, when it will have the effect of defeating the deed as a conveyance: *Schemerhorn v. Vanderheyden*, *supra*.

MILLER v. MILLER.

[1 J. J. MARSHALL, 169.]

CHOSES IN ACTION, which belonged to a woman prior to her marriage, or accrued to her during coverture, survive to her if she survive the husband, unless reduced to possession by the latter. If the husband survive the wife, he is entitled to them under the statute of distributions.

QUESTION upon a devise. Appeal from the Trigg circuit. The opinion states the case.

Triplett, for appellant.

Denny and Mayes, contra.

By Court, ROBERTSON, J. This is an agreed case, and its decision depends on one isolated question of law, viz., whether the administrator of the husband, or the surviving wife, is entitled to money devised to her during coverture, and not received or otherwise disposed of by the husband in his life-time.

The circuit court decided that the administrator of the husband is entitled to the legacy. This decision is evidently wrong. The doctrine on this point has been so long and so clearly settled, and the decisions upon it have been so uniform by the courts of England and most of the American states, so far as known by this court, that it was not to have been expected that the right of the survivor could be, at this day, called in question. The choses in action belonging to the wife, before marriage, do not vest in the husband until he assigns or otherwise appropriates them. If he die without making any disposition of them, they survive to the wife. But if the husband survives the wife he is entitled to them by the construction of the statute of distribution. And the administrator of the wife (if other than the husband) is a trustee for the husband: Bingham, 208, 209; Com. Dig., title Bar. and Fem. E. 3; 6 Johnson's, 112; Butler's note, 304, to Co. Lit.; 3 Atkins, 527; 1 P. Wms. 381, 383; 3 Lit. 281; and many other cases which might be cited.

Choses in action which accrue to the wife during coverture, such as bonds or legacies to her, may be appropriated, or otherwise disposed of, by the husband. But if he die without receiving or making any disposition of them, they survive to the wife: Com. Dig., tit. Bar. and Fem.; 3 Bac. Abr. 65; 1 Mad. Ch. 381, 382, 383; 1 Chitty, 18, 19, 20, and cases there cited; Bingham, 210; 3 Bibb, 499; 1 Bac. Abr. 501; Cro. Jac. 77, 205; 3 Litt. 282; 4 Hen. & Mun. 453; and many other cases might be cited.

The same authorities show that if the husband survive the wife, he is entitled to the legacies or other choses in action, which accrued to her during coverture: See especially Com. Dig., Bar. and Fem. 10; and Toller, 224. The wife having survived the husband in this case, is entitled to the legacy which her husband did not dispose of or receive. It is a chose in action.

The judgment of the circuit court is therefore reversed, and the cause remanded, with instructions to give judgment for the plaintiff.

HILDRETH'S HEIRS v. MCINTIRE'S DEVISEE.

[1 J. J. MARSHALL, 206.]

DE FACTO COURT OF APPEALS can not exist under a written constitution which ordains one supreme court, and defines the duties and qualifications of its judges.

OFFICE DE FACTO can not exist under a written constitution.

GOVERNMENT DE FACTO, WHEN VALID.—The entire revolutionization of a government, the usurpation of all its departments by force, and the transfer of all its attributes of sovereignty from those who have been legally invested with them to others, who, sustained by a power above the forms of law, claim to act and do act, will, from political necessity, render the same a valid *de facto* government.

SCIRE FACIAS. Appeal from the Bourbon circuit. The opinion states the case.

Hanson, for appellants.

Talbot and Shepherd, contra.

By Court, ROBERTSON, J. The appellants, having prosecuted an appeal to the court of appeals, Messrs. Barry, Haggin, Tremble, and Davidge dismissed it in 1825, because the record was not filed with F. P. Blair, who was acting as clerk to them. A certificate of the dismissal, signed by Blair as clerk of the court of appeals, was presented to the circuit court of Bourbon (from which the appeal had been taken), and although objected to by the counsel of the appellants, was received and entered on the record by the court, and thereupon a *habere facias* was directed to issue to carry into effect the original decree, to reverse which the appeal had been granted. The only question presented for our decision is, whether the court erred in obeying the mandate of Messrs. Barry, etc., certified by F. P. Blair. And a solution of this question depends on another, viz., whether Barry, etc., were judges of the court of appeals, and Blair its clerk.

Although they assumed the functions of judges and clerk, and attempted to act as such, their acts in that character are totally null and void, unless they had been regularly appointed under, and according to, the constitution. A *de facto* court of appeals can not exist under a written constitution which ordains one supreme court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. There can not be more than one court of appeals in Kentucky as long as the constitution shall exist, and that must necessarily be a court "*de jure*." When the government is

entirely revolutionized, and all its departments usurped by force or the voice of a majority, then prudence recommends, and necessity enforces, obedience to the authority of those who may act as the public functionaries, and in such a case the acts of a *de facto* executive, a *de facto* judiciary, and of a *de facto* legislature, must be recognized as valid. But this is required by political necessity. There is no government in action excepting the government *de facto*, because all the attributes of sovereignty have, by usurpation, been transferred from those who had been legally invested with them, to others, who, sustained by a power above the forms of law, claim to act and do act in their stead.

But when the constitution or form of government remains unaltered and supreme, there can be no *de facto* department or *de facto* office. The acts of the incumbents of such departments or office can not be enforced conformably to the constitution, and can be regarded as valid only when the government is overturned. When there is a constitutional executive and legislature, there can not be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky as a "*de facto*" court of appeals. There can be no such court whilst the constitution has life and power. There has been none such. There might be under our constitution, and there have been "*de facto*" officers. But there never was and never can be, under the present constitution, a "*de facto*" office. The gentlemen who directed the appeal in this case to be dismissed, and the one who certified the order, did not hold office in the court of appeals. The legislature had attempted to abolish the court of appeals, ordained and established by the constitution, and create in its stead a new court. This attempt was ineffectual for want of legislative power. The offices attempted to be created never had a constitutional existence, and those who claimed to hold them had no rightful or legal power. They were not appointed to the court of appeals fixed by the constitution. They did not claim to exercise the functions of this court. Their tribunal claimed to derive its origin from the *fiat* of the legislature. The court of appeals had not been, and could not be, abolished. Its judges had not been removed from office, and were acting and ready to continue acting as judges. The act of the legislature did not intend to superadd four judges to the number already in office in the court of appeals.

It can not receive, and never has received, such a construc-

tion. The gentlemen who acted as judges of the legislative tribunal did not claim to be, and certainly were not, associates of the judges of the constitutional court. They were not their successors. They were not the incumbents of *de jure* or *de facto* offices; nor were they *de facto* officers of *de jure* offices. For if such a thing could be as a *de facto* judge of the court of appeals of the constitution, these gentlemen did not hold any such place for the reasons before assigned. They had no official rights or powers. The appellants were not bound to file their record with their clerk. It would have been useless to do so. They chose not to do it, and can not be prejudiced by anything which individuals destitute of sufficient authority may have thought fit to venture to do with the appeal. The appeal was not taken to them; it was not properly before them; and everything which they attempted in relation to it is literally void. Their acts can not be enforced by law. Such is the inevitable consequence of the decision, that they were not judges; that they were not, is our unhesitating opinion; and this opinion is sustained by that of the sovereign people in their electoral and legislative assemblies; and has been frequently reiterated by the unanimous judgments of our predecessors, on motions and otherwise.

The circuit court proceeded on the assumption that either this new tribunal was the court of appeals, or that it was such a *de facto* court as could exercise judicial functions "*ad interim*." In this the court erred.

Therefore, the judgment is reversed.

OFFICERS DE FACTO, WHO ARE.—In the court of king's bench, in the case of *King v. Bedford Level*, 6 East, 356, Lord Ellenborough, speaking for the court, defined an officer *de facto* to be "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." This definition was adopted upon full consideration, and may be considered as accurately stating who an officer *de facto* is as recognized in the courts of England at the present day. Questions regarding officers *de facto* frequently came before the English courts at an early date, and the adjudications in that country are numerous, and with one exception, to be hereafter referred to, uniform. The earliest case in which this question was considered by those courts was the *Abbot of Fountains's case*, determined in 1431, and reported in the year books, 9 Henry VI., 32, pl. 3. It was followed by *Knowles v. Luce*, Moore, 109, 112; and *O'Brian v. Knivan*, Cro. Jac. 552, the latter decided in 1520. In the last-named case it was held that the acts of a person, acting as a bishop, before a former bishop had been legally removed, were valid as to third persons as the acts of a bishop *de facto*, but that such acts "as tend to the depauperation of the successor in office" were invalid. *Lord Dacre's case*, 1 Leon. 288, decided in 1553; *Leak v. Howel*, Cro. Eliz. 553, in 1596; *Harris v. Jay*, Id. 699, in 1599; and *Knight v. The Corporation of Wells*, Lutwych, 508, in 1688, all recognize the validity of the

acts of *de facto* officers, and considered such an officer to be "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *Parker v. Kett*, 12 Mod. 467; S. C., 1 Ld. Raym. 658, is recognized as the leading English case on this question, and is the authority upon which Lord Ellenborough relied for his definition given of such officers, in *King v. Bedford Level*, *supra*. In that case it appeared that one Clerke, who was a deputy steward legally appointed, had attempted to delegate his authority to Thacker and Ballaston, and although such attempt was held to be absolutely void, yet the acts of the latter were determined to be valid and binding, inasmuch as such appointment had given them "the reputation of being good stewards." This case was decided in 1693, by that eminent jurist, Lord Holt, in which he made use of the following language: "Doubtless a steward *de facto* may take a surrender. Then such steward is no other than he who has the reputation of being steward, and yet is not a good steward in point of law." It often becomes a matter of much difficulty to be able to determine whether a person who claims to be an officer *de facto* is such, or whether he is simply a mere usurper. In England, in order that a person may be recognized as an officer *de facto*, and his acts held valid as such, he must occupy the office under some form or color of an election, or under some claim of title, or he must have the reputation of being the officer he assumes to be; and the mere occupancy and exercise of the functions of an office without such color or claim, or without having the reputation or being recognized as such, are insufficient to make his acts valid as the acts of such an officer. In *King v. Lisle*, 2 Strange, 1090; S. C., Andrews, 163, it was decided that "in order to constitute a mayor *de facto* it is necessary that there be some form or color of an election." That case was *quo warranto* against the defendant as a pretended burgess in the town of Christ Church. Lisle was nominated and elected burgess. He was nominated by one Goldwire, who was acting as mayor, although he had never been in fact elected, but pretending to be so, was sworn in and acted as such. It was claimed that inasmuch as Goldwire had not exercised the duties of the office under color of an election, he was neither a mayor *de facto* nor *de jure*. It also appeared that subsequent to the election of Lisle, Goldwire had been ousted from the office of mayor. The court said, Andrews, 173: "Goldwire was not so much as a mayor *de facto*. For in order to constitute a mayor *de facto* it is necessary that there be some form or color of an election; but without this, the taking the title and regalia of the office, and the acting and being sworn in as mayor, are not sufficient."

As thus stated by the court, the doctrine would seem to be opposed to the rule as established by Lord Holt, in *Parker v. Kett*, *supra*, inasmuch as it failed to state that if Goldwire had had the reputation of being mayor, and had been recognized as such, his acts would have been valid as the acts of a *de facto* mayor. There is not, however, any real conflict between the two cases, because the definition given in *Parker v. Kett*, was adopted only with reference to the rights of the public or third persons, and was not declared to be applicable when the proceedings were for the purpose of ousting the officer; and also because that portion of the opinion just quoted, as appears from the report thereof in Andrews, was not considered necessary for the determination of the case, for the court immediately afterwards assumed that Goldwire was a *de facto* mayor, but held that the acts performed by him were void, because they were unnecessary for the preservation of the corporation. This portion of the opinion does not appear from the case as reported in Strange. That report would indicate that the decision was simply to the effect that unless

there is some form of an election a person can not become an officer *de facto*, and that the bare swearing in does not make him such an officer. This account of the case, however, is very meager, unsatisfactory, and apparently inaccurate, as it not only differs from a much fuller report of the same case in Andrews, but is directly opposed to all the other English cases. If, however, the report in Strange is accurate, it is the only exception, as far as our researches extend, to the definition of who such officers are, as defined by Lord Holt and Lord Ellenborough: *King v. Mayor etc. of Shrewsbury*, Temp. Hard. 147; *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266; *Scadding v. Lorant*, 5 Eng. Law. & Eq. 16, 30; Viner's Abridgment, vol. 16, p. 114.

In America the prevailing English definition has been adopted in its broadest and most comprehensive sense. A few early cases are found following *Rex v. Lisle*, as reported in 2 Strange, holding that in order to constitute a person an officer *de facto*, he must occupy the office under some color or claim of title. *McCall v. Bryan*, 6 Conn. 428; *People v. Collins*, 7 Johns. 549; *McInstry v. Tanner*, 9 Id. 135; *Douglas v. Wickwire*, 19 Conn. 492; *Cocks v. Halsey*, 16 Pet. (U. S.) 71; *Coolidge v. Brigham*, 1 Allen, 333; *F. R. Co. v. G. J. R. & D. Co.* Id. 552. But these decisions have been greatly qualified by subsequent adjudications; thus in *F. R. Co. v. G. J. R. & D. Co.* 1 Allen 552, 557, the supreme judicial court of Massachusetts in considering the distinction between a usurper or intruder, and an officer *de facto*, said "the former has no color or title to the office; the latter has, by virtue of some appointment or election." To the same effect is *Coolidge v. Brigham*, Id. 333. In *Petersilea v. Stone*, 119 Mass. 467, decided in 1876, that court, in considering a similar question to the one presented in the two cases reported in 1 Allen, just cited, expressly held that the definition adopted in those two cases was not sufficiently comprehensive and that adopted by the English courts was followed as correct. Devens, J., in speaking of the definition just quoted, said: "If this were intended as a general definition of an officer *de facto*, it would be incomplete, but the inquiry there presented to the court was as to the validity of certain acts done by one who acted under a commission *prima facie* valid, and issued by an authority apparently empowered to invest him with the legal rights and powers of the office to which he was appointed, and it is to be limited to the case then before the court. The reasons of public policy, upon which it is held that the acts of an officer *de facto* are not to be called into question collaterally, but were valid as to third persons, may apply even to the case where such officer is a usurper and intruder. * * * Third persons from the nature of the case, can not always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called into question." See, to the same effect, *Wilcox v. Smith*, 5 Wend. 231; *People v. Kane*, 23 Id. 414; *People v. White*, 24 Id. 520; *Petersilea v. Stone*, 119 Mass. 465; *Wilson v. King*, 3 Lit. 457; *State v. Carroll*, 38 Conn. 449.

The supreme court of Connecticut in 1871, in *State v. Carroll*, *supra*, after an exhaustive review of all the English and American authorities, decided that a person might be an officer *de facto* without the necessity of his exercising the duties of the office under color of election or of rightful appointment thereto, and that it was sufficient to constitute a person such an officer that he had exercised the duties of the office for such a length of time as would

afford a presumption that he was legally entitled thereto. The court in the course of its opinion adopted the following comprehensive definition of who are such officers. "An officer *de facto* is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office are exercised: 1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be. 2. Under color of a known and valid appointment or election, but where the officer has failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like. 3. Under color of a known election or appointment, void, because the officer was not eligible or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect, being unknown to the public. 4. Under color of an election or appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such;" and this definition is substantially recognized and adopted by nearly all the adjudications in the American courts of the present day. *Braid v. Theritt*, 17 Kan. 468; *Ellis v. The N. C. Institution*, 68 N. C. 423; *Threadgill v. T. C. C. R. Co.*, 73 Id. 178; *People v. Stanton*, Id. 546; *Burke v. Elliott*, 4 Ired. Law, 355; *Brown v. Lunt*, 37 Me. 423; *People v. Lieb*, 85 Ill. 484; *Pierce v. Wear*, 41 Iowa, 378; *McLean v. State*, 8 Heisk. 22; *Fowler v. Bebee*, 9 Mass. 231; *Sheehan's case*, 122 Mass. 445; *Mallett v. U. S. G. & S. M. Co.* 1 Nev. 188; *Ex parte Norris*, 8 S. C. 408, decided in 1876, where the validity of a pardon issued by Wade Hampton while acting as *de facto* governor of South Carolina, was before the supreme court of that state for determination: *Carleton v. People*, 10 Mich. 250; *Clark v. Commonwealth*, 29 Pa. St. 129; *Commonwealth v. McCombs*, 56 Id. 436; *State v. Williams*, 5 Wis. 308.

This rule extends to all officers, judicial, executive, or ministerial: *Milward v. Thatcher*, 2 T. R. 81-87; *People v. White*, 24 Wend. 527; *Sheehan's case*, 122 Mass. 446; to inferior as well as superior officers: *State v. Carroll*, 38 Conn. 449; *Mallett v. U. S. G. & S. M. Co.*, 1 Nev. 188; but there can not be at the same time, an officer *de jure* and one *de facto* in possession of the same office: *Boardman v. Halliday*, 10 Paige, 232; *Canover v. Devlin*, 15 How. Pr. 479; see *contra*, *O'Brien v. Knivan*, Cro. Jac. 552; *Harris v. Jays*, Cro. Eliz. 699; nor can there be two *de facto* officers in possession of the same office at the same time: *Canover v. Devlin*, *supra*.

PRESIDENTS, DIRECTORS, AND OTHER OFFICERS OF PRIVATE CORPORATIONS, who have been illegally elected, or who by reason of some disqualification are ineligible to the office, the duties of which they are exercising, are held to be within the definition stated, and their acts are treated as valid and binding as the acts of *de facto* officers: *Rockville v. Andrews*, 2 Cranch, C. C. 449; *Dispatch Line of Packets v. Bellamy Manf. Co.*, 12 N. H. 223; *Atlantic R. R. Co. v. Johnston*, 70 N. C. 349; *Walker v. Fleming*, Id. 483; *O. & M. R. R. Co. v. McPherson*, 35 Mo. 13; Angell and Ames on Corporations [10 ed.], sections 137, 138, 139, 140, 286, and 287; *Savage v. Ball*, 17 N. J. Eq. 142; *Bank of U. S. v. Dandridge*, 12 Wheat. 64, 79; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. (Mich.) 124; *P. & K. R. Co. v. Dunn*, 39 Me. 587; *Doremus v. Dutch Reformed Church*, 2 Green's Ch. (N. J.) 332; *All Saints' Church v. Lovett*, 1 Hall (N. Y.), 191; *Baird v. Bank of Washington*, 11 S. & R. 411; *D. & H. Canal Co. v. Penn. Coal Co.*, 21 Penn. St. 131; *Matter of Directors of M. & H. R. R. Co.*, 19 Wend. 135; *Matter of the Chenango*

C. M. Ins. Co., Id. 635; *Trustees of Vernon Society v. Hills*, 6 Cowen, 23; *Partridge v. Badger*, 25 Barb. 146; *In re County Life Assurance Co.*, L. R. 5 Chan. App. 288; *Mahony v. East Holyford, Min. Co.*, L. R. 7 H. L. 894. (Eng. and Irish appeal cases.)

CORPORATIONS DE FACTO.—The same rule applies to the acts of the corporation itself, and although in the organization of a private corporation "many of the acts required to be performed in order to make a complete organization of the corporation may have been irregularly performed, or some of them entirely omitted," yet if the corporation claims in good faith to be a corporation and is doing business as such, its acts are valid as the acts of a *de facto* body, and are not liable to be assailed in a collateral proceeding: *Spring Valley W. W. v. San Francisco*, 22 Cal. 434; *M. H. M. Co. v. Woodbury*, 14 Id. 424; *Dannebrog Mining Co. v. Allment*, 26 Cal. 286; *Rondell v. Fay*, 32 Id. 354; *O. & V. R. R. Co. v. Plumas Co.*, 37 Id. 354; *S. & L. G. R. Co. v. S. & C. P. R. Co.*, 45 Cal. 680; *Bakersfield Town Association v. Chester*, supreme court of California, decision filed June 1, 1880; *Euton v. Aspinwall*, 19 N. Y. 119; *McFarlan v. T. T. Ins. Co.*, 4 Denio, 392; *D. C. Man'f. v. Davis*, 14 Johns. 238. Thus it was held that the failure to file a duplicate of the articles of association with the secretary of state did not invalidate the corporation: *Mokelumne Hill M. Co. v. Woodbury*, 14 Cal. 424; *Cross v. P. M. Co.*, 17 Ill. 54. So where a charter was granted to a corporation upon the performance of a condition precedent, and the corporation has commenced business, it will be presumed that the condition has been performed: *Angell and Ames on Corp.* 59. So in *Ex parte Spring Valley Water Works*, 17 Cal. 132, it was held that the failure to state in the certificate of corporation the principal place of business of the corporation did not invalidate the proceedings of the latter. It must appear, however, that the corporation claims in good faith to be, and that it is actually engaged in the exercise of the functions of a corporation, and the mere assumption of a body of men that they constitute a corporation, and an attempt to derive certain benefits conferred on corporations, will not be sufficient to constitute them a corporation *de facto*. In *O. & V. R. R. Co. v. Plumas Co.*, 37 Cal. 361, Rhodes, J., speaking for the court, in construing the proviso to section 6 of the general incorporation act of California, stats. 1862, p. 110, which provided "that the question of the due incorporation of any company, claiming in good faith to be a corporation under the laws of this state, and doing business as such corporation, or of its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party," said: "The statute furnishes a rule of evidence. It is declared that the due incorporation of any company shall not be inquired into collaterally in any private suit, etc., in a certain case; that is, when the company claims in good faith to be a corporation. The alleged corporation must both claim in good faith that it is such corporation, and must be doing business as such corporation, and then its due incorporation can not be inquired into. To say that the 'due incorporation' can not be inquired into collaterally, does not mean that no inquiry can be made as to whether it is a corporation. * * * A substantial compliance with the requirements of the statute will be sufficient to show a corporation *de jure* in an action between the corporation and a private person. But suppose a body of men meet and declare that they constitute the corporation, but neither subscribe to the capital stock, nor adopt articles of association, nor appoint any officer, nor perform any act in the organization of the corporation, nor transact any business as a corporation, except in demanding that the board of supervisors subscribe to the stock and deliver

the county bonds, they can not claim the benefit of the proviso, for they do not claim in good faith to be a corporation, and are not doing business as a corporation." The latter case was approved in *S. & L. G. R. Co. v. S. & C. R. R. Co.*, 45 Cal. 680, and in *Bakersfield Town Hall Association v. Chester*, decided June 1, 1890, by the supreme court of California. In the case last mentioned, there was a failure to file the articles of incorporation in the county clerk's office, yet the court held that inasmuch as the corporation plaintiff had claimed in good faith for many years to be a corporation and had been doing business as such, it was a valid *de facto* corporation.

FAILURE OF OFFICER TO QUALIFY BY TAKING OATH, GIVING BOND, ETC.—The mere failure on the part of an officer to take the oath of office, or to give the bond required as a prerequisite to the exercise of the duties of the office, will not have the effect of invalidating his acts, but the same will be valid and binding, as to the public and third persons, as the acts of a *de facto* officer, although such prerequisites are not complied with: *State v. Perkins*, 4 Zab. 409; *McBee v. Hoke*, 2 Speers, 138; *Kattman v. Ayer*, 3 Strobb. 92; *Knight v. Corporation of Wells*, Lutw. 508; *People v. Collins*, 7 Johns. 554. The same rule applies, although such person may be constitutionally ineligible to the office: *McIntire v. Tanner*, 9 Johns. 135; *People v. White*, 24 Wend. 540.

THE PERSON MUST CLAIM TO BE THE OFFICER.—The mere exercise of the functions of an office, will not be sufficient to make a person a *de facto* officer where there is no claim to the office under color of an election or an appointment, unless the exercise thereof has been open, notorious, and continued for such a length of time, without the public having interfered, as to justify the presumption that the party was duly appointed: *Burke v. Elliott*, 4 Ired. L. 355; *State v. Carroll*, 38 Conn. 449; *Gilliam v. Reddick*, 4 Ired. L. 368; *Wilcox v. Smith*, 5 Wend. 231; and where such is the case, the acts of such officers can not be attacked collaterally as invalid, but only in a direct proceeding by the proper authority: *People v. Sassovich*, 29 Cal. 480; *Gumberts v. T. A. E. Co.*, 28 Ind. 181; *Creighton v. Piper*, 14 Id. 182; *People v. Stevens*, 5 Hill (N. Y.), 616; *People v. Albertson*, 8 How. Pr. 363; *Hooper v. Goodwin*, 48 Me. 79; *Plymouth v. Painter*, 17 Conn. 585; *Neale v. Overseers*, 5 Watts, 538; *Commissioners v. McDaniel*, 7 Jones L. 107; *Callison v. Hedrick*, 15 Gratt. 244; *Aulanier v. Governor*, 1 Tex. 653; *Coles County v. Allison*, 23 Ill. 437; *Commonwealth v. Kirby*, 2 Cush. 577.

OFFICER DE FACTO, ACTS OF, INVALID AS TO HIMSELF.—As hereinbefore stated, from considerations of public policy, the acts of *de facto* officers are valid and binding as to the public and third persons, yet as to himself, they are invalid, and afford him no protection whatever: *Canover v. Devlin*, 15 How. Pr. 470-477; *U. S. v. Maurice*, 2 Brook. 96; *Neale v. Overseers*, 5 Watts, 539; *Riddle v. County Bank*, 7 S. & R. 392; *Green v. Burke*, 23 Wend. 490; *Gourley v. Hankins*, 2 Iowa, 75; *People v. Hopson*, 1 Denio, 574; *Keyser v. McKissan*, 2 Rawle, 139; *Cummings v. Clark*, 15 Vermont, 653; *Venable v. Curd*, 2 Head, 582; *Patterson v. Miller*, 2 Metc. (Ky.), 493; *Blake v. Sturtevant*, 12 N. H. 567.

A payment to a *de facto* officer has been held to be no defense to the claim to the salary of the office by the officer *de jure*: *People v. Brennan*, 30 How. Pr. 417; but this case may now be considered as practically overruled by the late case of *Dolan v. Mayor*, 68 N. Y. 274; S. C., 23 Am. R. 168, where it was determined that the payment of the salary of an office to the person actually in the occupancy thereof, although he was only a *de facto* officer, was a complete protection to the disbursing officer in an action against him to re-

cover the same salary by the officer *de jure*, but that an action might be maintained against the person to whom the money had been paid by the person who was the *de jure* officer. To the same effect is *Mayfield v. Moore*, 53 Ill. 428; S. C., 5 Am. R. 52. In California it was early held that the salary of an office was incident to its title, and not its occupation, and that one having the legal right to the office, but not in possession thereof, was entitled to the salary for the term for which he was elected, notwithstanding the same had been paid to the person actually in the occupancy thereof: *People v. Dorsey*, 28 Cal. 21; *People v. Oulton*, Id. 44; approved and followed in *Carroll v. Silberthaler*, 37 Id. 193. In other states this would seem to be the rule, provided the salary has not been actually paid to the *de facto* officer, and where that is the case, the remedy is against the latter by the officer *de jure* to recover the salary so paid: *People v. Miller*, 24 Mich. 458; S. C., 9 Am. R. 131; *Comstock v. Grand Rapids*, 40 Mich. 397; *Mayfield v. Moore*, 53 Ill. 428; S. C., 5 Am. R. 52; *Dolan v. Mayor*, 68 N. Y. 274; S. C., 23 Am. R. 168.

In the latter case, the reason for this exception is stated by Andrews, J. He says: "If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission and investigate and ascertain the real right and title. * * * Disbursing officers, charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure* without inquiring whether another has the better right. Public policy accords with this view. Public offices are created in the interest and for the benefit of the public; such, at least, is the theory upon which statutes creating them are enacted and justified. * * * It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it the second time; if the title of the contestant should subsequently be established it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions." A party suing for a right flowing from an office must show a legal title thereto. An officer *de facto* can not recover the fees incident to the office: *Kimball v. Alcom*, 45 Miss. 151; *Matthews v. Supervisors*, 53 Id. 715; 24 Am. R. 715; *Riddle v. Bedford*, 7 Serg. & R. 386; *People v. Dorsey*, 28 Cal. 21; *People v. Oulton*, Id. 44; *Carroll v. Silberthaler*, 37 Id. 193; *People v. Tiernan*, 30 Barb. 193; *Neale v. Overseers*, 5 Watts, 538.

OFFICERS DE FACTO, authority of, recognized: *Fowler v. Bebee*, 6 Am. Dec. 62; *Buckman v. Ruggles*, 8 Id. 98; *Doty v. Gorham*, 16 Id. 417.

GARRISON v. HAYDON.

[1 J. J. MARSHALL, 222.]

DEED MUST BE RECORDED IN THE COUNTY where the land lies at the date of recordation.

COUNTY CLERK'S CERTIFICATE of the county in which the land was at the date of the deed, but not at the date of its record, is not such an authentication as will authorize the deed to be used as evidence of title.

EJECTMENT. Appeal from the Jessamine circuit. The opinion states the case.

Crittenden, for appellant.

By Court, ROBERTSON, J. Garrison, in deducing title to a tract of land in Jessamine county, in an action of ejectment against Haydon, offered a deed certified by the clerk of the county court of Fayette, for the land, acknowledged and recorded in Fayette. The land lay in Fayette at the date of the deed, but at the date of the acknowledgment it was in Jessamine, the latter county having, in the mean time, been established; and the only question to be decided in this case is, whether the court erred in rejecting the deed. A proper construction of either the letter or object of the act of assembly, which requires deeds for land to be recorded in the county in which the land lies, must sustain the opinion of the circuit court. The deed must be recorded in the county in which the land lies at the time the deed is deposited for registration. When a party is about to deposit his deed to be recorded, the act of assembly addresses him in this language: "Have it recorded in the county in which the land lies;" that is, the county in which it lies now, when you make the deposit. The object of this requisition is to give notice in the county of the transference of the title to the land. As, therefore, the clerk of Fayette had no legal right to receive the acknowledgment, his certificate of the fact of the acknowledgment is no authentication of the deed. The recording a deed not being necessary to pass the title as between the parties to it, proof of the original by the subscribing witnesses would have been sufficient for the plaintiff in this case. But as he chose not to offer such proof, and relied on the certificate of the Fayette clerk, he must abide the consequence of his error: See *Astor v. Wells et al.*, 4 Wheaton, 466.

The judgment of the circuit court is affirmed.

RECORDING, effect of, where boundaries of counties are changed, *Conn. v. Manifee*, 12 Am. Dec. 417, note 421. See generally as to the effect of the recording of instruments not entitled to record: *James v. Morey*, 14 Id. 512.

BRECKENRIDGE'S HEIRS v. ORMSBY.

[1 J. J. MARSHALL, 236.]

CONTRACTS OF LUNATICS AND INFANTS are identical in their legal effects, and such acts of an infant as are void or voidable, if done by a lunatic, would be void or voidable.

CONTRACTS OF LUNATICS ARE VOIDABLE, not void.

VOID CONTRACT IS ONE that is a nullity, obligatory on neither party and insusceptible of ratification.

VOIDABLE CONTRACT is one where only one of the parties is bound, or that is the subject of confirmation.

INFANTS' CONTRACTS are voidable only.

CONTRACTS OF FEMES-COVERT are void.

EXECUTION AND DELIVERY of a deed has the same effect and takes the place, in this country, of feoffments and livery of seisin.

PRIVIES IN BLOOD AND IN REPRESENTATION may avoid the voidable deeds of infants and lunatics, but privies in estate can not.

PRIVIES IN ESTATE, discussed, explained, and held not to include a purchaser from the person under disability after such disability has been removed, and that such purchaser might avoid a deed which his vendor could have avoided.

ANY ACT AFTER a person becomes of age dissenting from a deed, delivered during infancy, of equal solemnity with the deed, annuls and avoids the same.

PAYMENT OF A MORTGAGE DEBT, whether before or after forfeiture, extinguishes the debt, and the title vests in the mortgagor or his vendee, without release or reconveyance.

BILL in chancery. Appeal from the Jefferson circuit. The opinion states the facts.

Wickliffe and Chinn, for appellants.

Haggin and Crittenden, contra.

By Court, ROBERTSON, J. In 1800, Walter Beall mortgaged to Robert Andrews and John Pierce, in trust for Samuel Beall, various tracts of land, town lots, etc. In April, 1801, he mortgaged the same property to John Breckenridge, to secure the payment of one thousand pounds. In 1802, he mortgaged it again to John Breckenridge, as security for another liability, and recognized and referred to the mortgage of 1801. In 1804 he sold one of the mortgaged lots to Peter B. Ormsby, and made him a deed for it. John Breckenridge and Walter Beall both having previously died, in October, 1811, the representatives of Breckenridge brought a suit in chancery in the Fayette circuit court against N. B. Beall, the administrator, and Samuel Beall, the devisee of the decedent, W. Beall, and against the trustees, Andrews and Pierce, praying a foreclosure of the mortgage of 1801. In the progress of the suit the heirs of the de-

cedent Beall were made defendants. The administrator acknowledged service of the subpoena, and it was executed on S. Beall in Fayette. The heirs answered, and there was a publication for eight weeks against the trustees.

A foreclosure of the equity of redemption and sale of as much of the mortgaged property as might be necessary were decreed by the court, and among other things the lot in Bardstown, in the possession of P. B. Ormsby, was sold by the commissioner appointed by the decree, and purchased by P. B. Ormsby himself for four thousand and thirty dollars, for which he executed bond with the said N. B. Beall, his security. Having failed to pay the amount of the bond when due, suit was brought on it, and judgment obtained against him and N. B. Beall in the Jefferson circuit court. The property of P. B. Ormsby was sold by execution, to satisfy this judgment, and was purchased by his brother, Stephen Ormsby, on a credit, and who executed his bond therefor. N. B. Beall had filed a bill of review, to correct the decree, and failed, and he and P. B. Ormsby had made a motion in the same court to set aside the sale and quash their bonds, which also failed. This suit was instituted in the Jefferson circuit court by P. B. Ormsby, for the purpose of enjoining the payment of his bond, by Stephen Ormsby; and the bill relies principally on these grounds: First—That Walter Beall was in a state of lunacy in 1801, when he executed the deed of mortgage to Breckenridge. Second—That the decree is inoperative and void for want of jurisdiction in the Fayette court, the defendants and all the mortgaged property (as alleged) being in other counties, and for want of proper parties. Third—That P. B. Ormsby did not know, when he made the purchase of the lot, that he could prevent the sale or avoid the decree. The circuit court of Jefferson granted the injunction, and by its final decree made it perpetual. And this appeal is prosecuted to reverse this decree.

The main questions which the assignment of errors presented for consideration are: 1. Whether (admitting the alleged lunacy) the deed of 1801 was void or voidable? 2. If only voidable, whether it was confirmed by that of 1802, when it is admitted that Walter Beall was *compos mentis*? 3. If not confirmed, whether Ormsby, as a subsequent purchaser, can avoid it? and 4. Whether the Fayette decree can be questioned in this suit? A parallel is supposed to exist between the civil acts of lunatics and infants. This is the well-established doctrine of the law, as evinced by a series of decisions in England and the

American States. It is not necessary to inquire into the reason or fitness of this analogy. Its judicial sanctions give it the irresistible force of unquestionable authority. But if there had been no decision upon it, we should be inclined to the opinion that the contracts of lunatics and infants should be identical in their legal effects; and that such acts of an infant as are void should be void if done by a lunatic; and such as are only voidable by plea of infancy, should be but voidable by reason of lunacy. The only exception to this parallelism is that (according to a preponderance of authority) the lunatic can not himself, like the infant, plead his disability. We know of no other. The authorities conclusively show that the contracts of infants and lunatics are alike void or voidable: 3 Bac. Abr. 301; 1 Ld. Raym. 313; Highmore, 113; 3 Mod. 308.

Infants and lunatics are placed on the same footing of entire exemption from liability for any contract by the Roman law: Institutes, lib. 3, tit. 20. And it is admitted by all the counsel in the argument of this case, that when contracts of the one are only voidable, those of the other class are not void. If there be any difference between the effects of a contract by an infant and that of a lunatic, it must be to the disadvantage of the latter; for as it seems to be generally admitted that a lunatic can not avoid his acts by plea of stultification, there might be some difficulty (if such be the law) in determining that any of them could be absolutely void. However this may be, it will be sufficient for the decision of the first point in this case to consider the deed of a lunatic as a deed by an infant; and this we shall do, because the authorities are more abundant and more satisfactory on the voidness or voidability of deeds by infants than of those by lunatics.

It will be fair, then, to consider the deed of 1801, in this case, as one executed by an infant; and if in so considering it the result shall be that it is only voidable, the appellee will certainly have no right to complain; because it could not, in that event, be more than voidable by W. Beall, even if his lunacy had been indubitably established. It is somewhat doubtful whether Walter Beall was, in the proper sense of the term, a lunatic, in 1801. The evidence is contradictory and unsatisfactory. It is numerically on the side of incapacity, but when carefully scrutinized, leaves the mind in serious doubt and perplexity. If this were, therefore, the only point in the case, we should scarcely be willing to decide against the conclusive validity of the deed. But waiving a decision of this fact, and admitting

the lunacy as if well established, is the deed void, or is it only voidable? The answer must be, that it cannot be more than voidable. There is not a perfect coincidence in all the decisions and dicta on this subject. But the force of the argument and the weight of the authorities decisively preponderate against the assumption that the deed is void.

The common law, in this respect more liberal and more advantageous to the interest of infants than the civil code, enables them to make some contracts which they can not avoid, and others which they may avoid or not, as they deem most expedient. Very few of the contracts of infants are void, and it is well for them that such is the law. For deplorable indeed would be their condition, if, during the period of their minority, which is fixed by arbitrary law, they could make no contracts for their own benefit. Their legal disability would then be the opposite of what it is intended to be. It would be a handcuff instead of a shield; and the law would be their worst enemy, instead of being, as it professes to be, their guardian and best friend. For if all the contracts of infants be void, they are not only not binding on them, but create no obligation on those with whom they may be made; and infants would be thus doomed to vassalage, and frequently to destitution and oppression.

The enlightened benevolence of the common law, therefore, enables infants to make valid contracts with adults, and to secure their inexperience and imbecility from imposition, allows the infants, but not the other parties, the personal privilege of avoiding them, if they shall consider them disadvantageous. This is exactly as it should be. There are very few contracts from which the adult party can escape, under cover of the disability of the minor party. And it is questionable whether it is consistent with sound policy and the reason of the privilege of infancy, that there should be any. But those whose light we are bound to follow, have, for ages, admitted that there may be a class of contracts with infants which are entirely void, and which, therefore, either party may disregard. And although we may be unable to perceive the wisdom or justice of the distinction, it has become the law. A contract is void when it is a nullity, obligatory on either party, and insusceptible of ratification; when either party is bound, or it may be confirmed, it is only voidable. What this class of void contracts is, has not been yet ascertained with satisfactory precision. There are some *dicta* which countenance the inference that all contracts

are void, unless the thing contracted about pass by a delivery of it. This doctrine is relied upon by the appellee. Other authorities insist that all parol contracts, which are on their face prejudicial to the infant, and such by deed as do not take effect by the delivery of the deed, are void; and that all others are merely voidable, excepting those for necessities, which generally are binding. Of the two, the latter we consider the better doctrine of the law, and one more accordant with reason than the former. The only objection to it is, that it may be too comprehensive.

We doubt whether the same test should not be applied to contracts by infants for personal and for real estate, to those which are parol, and those which are by deed. And we doubt, too, whether the fact that a deed does or does not take effect, to pass title by a delivery of the deed, should have a decisive influence on the question whether it be void or voidable. The distinction between the delivery of the deed, and that of the land, seems to be arbitrary and to have obtained the apparent force of authority, either by the application of reasons peculiar to the ancient tenures and conveyances of England, or by a blind acquiescence in loose "*obiter dicta*." And as there is some diversity in the decisions on this point, and the old prevalent doctrine seems to be irrational and not precisely defined, we do not know that we should recognize it, if it were material to do so in this case. We incline to the opinion expressed by Lord Mansfield, that "there is no instance where the other party to a deed can object on account of infancy;" and consequently, that no deed of an infant is void for infancy only, unless one might be so, which would be embraced by the following classification suggested by the same jurist: "If a new case should arise where it would be more beneficial to the infant that the deed should be considered as void, if he might incur a forfeiture, or be subject to damages, or a breach of trust in respect of a third person, unless it was deemed void, the reason of the privilege would warrant an exception, in such case, to the general rule." If cases of this kind can occur in this country, in which it will be advantageous to the infants to consider the contract void, it would be consistent with the reason of the privilege accorded to infancy to render it void. But such cases can rarely, if ever, happen. And it is doubtful whether it would not be better for infants that none of their contracts should be avoided by any other persons than themselves, and consequently, whether it would not be best that all their con-

tracts should be only voidable. Be this, however, as it may, we are very well satisfied that a deed which passes a right by the delivery of the deed, is not void; and whatever else the authorities may intimate, they clearly prove this.

The leading cases which tend to the contrary conclusion, are those of *Thompson v. Leach*, 3 Mod. 310; and *Lloyd v. Gregory*, Cro. Ch. 502.¹ The *dicta* to the same effect, in some elementary treatises were inadvertently copied from these cases. These authorities will be found, on a strict examination, to be entitled to but little respect. The cases turned on other points, and the allusions to the livery of seisin are "*obiter* sayings," and the word "void" is used synonymously with "voidable."

These cases, therefore, furnish very little weight of authority. Besides they have been overruled by the case of *Zouch v. Parsons*, 3 Burrow, 1805-8, and by many other cases. In *Zouch v. Parsons*, a deed of lease and release, where there was no livery of seisin as in the case of feoffment, was declared not to be void; and this, ever since, has been considered a leading and authoritative decision. In his opinion, Lord Mansfield, among other things, says: "There is no difference in this respect, viz., as to the effect on infants between a feoffment and deeds which convey an interest. The reason is the same." The delivery of the deed must be in the presence of witnesses as much as the livery of seisin. The ceremony is as solemn. "That the witnesses would not attest if they saw him an infant," holds equally as to both. "The distinction between the deeds of *femes-covert* and infants is important; the first are void, the second are voidable." Speaking of the cases in which it had been said that leases without reservation of rent and surrenders are void, he says: "As to the first there are many *obiter* sayings, but there is no sufficient authority to outweigh the reasons against this position. I can not find a case adjudged singly upon that ground." Then, referring to some cases cited in argument, he says: "The lease was by parol. But reason soon prevailed, and it has long been settled that an infant may make a lease without rent to try the title," etc. What seems decisive is, that the lessee can in no case avoid the lease on account of the infancy of the lessor; which shows it not to be void, but voidable only. And it is better for infants that they should have an election." And as to the case of a surrender, he says: "I know of no judgment upon the ground that such a surrender is void. Most undoubtedly the other party can not say so."

1. *Lloyd v. Gregory*, Croke Char. 501.

"The end of the privilege is to protect infants. To that object, therefore, all the rules and exceptions must be directed." Other authorities are abundant. Lyttleton says: "If before the age of twenty, any deed or feoffment, grant, release, confirmation, obligation, or other writing, be made by any of them, all serve for nothing, and may be avoided." He did not mean that they are all void. He places them all on the same ground, and declares that they "may be avoided;" clearly showing that they are only voidable, and all equally so.

"The delivery of a deed can not be void but only voidable:" Bro. Abr., title, *dum fuil infra etatem*. He, an infant, may avoid it, that is a deed, when he will: 2 Inst. 673. Therefore Coke did not consider the deed void. The lease of an infant is voidable only: Cro. Jac. 320; Ral. Abr. 731. An infant can not plead *non est factum* to his deed, because it has an operation from its delivery: Cro. Eliz. 115. 1 Ld. Raym. 315; 17 Johns. 373; 2 Starkie, 724. "The deed of an infant is not void but only voidable:" Id. If an infant deliver a deed and when he attains legal maturity deliver it again, the second delivery is void, because the first is good until avoided: Perkins, sec. 154. A deed by an infant conveys a seisin, and passes a right to the grantee: 14 Mass. 462. All contracts under seal by infants, have a legal force until avoided: Id. "All such gifts, grants, or deeds, made by infants, which do not take effect by delivery of his hand, are void; but all gifts, grants, or deeds, made by infants, by matter, in deed or in writing, which do take effect by delivery of his hand, are voidable by himself, his heirs, and by those who have his estate:" Perkins, sec. 12. This shows clearly that all deeds which take effect, or pass a right by delivery of the deed itself, are only voidable. It is susceptible of no other construction. And this construction and the conclusive authority of the extract are recognized by Lord Mansfield and by this court, in the cases of *Cannon v. Alsbury*, 1 Marsh. 76; and *Philips v. Green*, Id. 37.¹

If the thing, or a right to it, pass by delivery of the deed, the deed is not void. Since the statute of Henry VIII., called the statute of uses, there are many modes of conveyance which pass the title as effectually as a feoffment, with livery actual or symbolical. And the execution and delivery of which deeds are authenticated in a manner as solemn and as public as feoffments were by the antiquated ceremonial of livery of seisin. And even before that statute, deeds of covenant for the pay-

1. 3 A. K. Marshall, 7.

ment of money or the performance of some other act, were as effectual in vesting a right in action, as they have been since. And it can not be admitted that they are void when executed by infants. But they should all be void, if the delivery which has been required mean a manual tradition of the thing, the right to which is transferred by the deed or writing. In this country there is no livery of seisin. A deed, when delivered, passes the whole right, including the possession: Kentucky Act of Conveyancing of 1797, sec. 12, and *Green v. Liler*, 8 Cranch, 234. A deed in this country perfects the title. A feoffment did not pass the right. It was the livery which transferred it. A deed, when delivered, has the same effect here to pass the title that a feoffment with livery had in feudal times. Is it not then reasonable that in all respects it is as effectual as the feudal conveyance, by feoffment with livery? If it is as effectual on all others, why not equally so on infants? It is so. No reason can be imagined for making a feoffment more valid than a deed of bargain and sale. And every reason for rendering a feoffment by an infant operative until avoided by himself or representatives, applies with full force to every other deed. Perkins was not mistaken, nor were Mansfield and those who have succeeded him; nor were the court of appeals of this state, and of other states, mistaken in the construction given by them to the twelfth section of Perkins.

The deed of an infant may be confirmed without an acknowledgment, or delivery, or new deed: Bac. Abr., tit. Infancy; 15 Mass. 220; 11 Johns. 541, 2, 3; 14 Id. 124; Bingham on Infancy, 65. It can not, therefore, be void. Blackstone says: "Idiots, and persons of non-sane memory, infants, and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only; for their conveyance and purchases are voidable, but not actually void." Thus distinctly placing all the persons mentioned on the same ground, and declaring that none of their deeds are void. The deed of a lunatic or person of non-sane mind is only voidable: *Beverley's case*, 4 Co. 123, b.; 2 Black. Com. 290; Newland, 16; Shep. Touch. 233. And all the cases which tend to the doctrine that a lunatic can not stultify himself, at the same time show, in advocating that position, that if they are right the deed of a *non compos* can not be void; because, if he can not avoid it, a present interest passes by it, and it is good against him. If a lunatic may plead his disability, still it is clear that the other party to the contract can not avoid it on that account, and,

therefore, it is not void. And there is, as before stated, no reason why a deed by a person of non-sane mind should be void, when that of an infant would be only voidable. As to infants, we feel very clear that the sound and rational doctrine is, that their deeds are not void, unless on their face they show that it is impossible that they can be beneficial to them; and we are not well satisfied that even then it would not be better and more consistent with principle and policy that they should be only voidable. If there be any sensible criterion for determining what deeds of infants are void, we are inclined to the opinion that it is not the "delivery," but the semblance or possibility of benefit to the infant; and that if this be a good test at all, it should apply to all cases with equal effect, whether they be contracts in writing or by parol; excepting such acts as pass or create rights or obligations by record; for these can only be avoided during infancy. Such was the opinion of Lord Raymond in the case of *Holt v. Clarencieux*,¹ and seems to have been the opinion of the learned annotator to Fonblanque; and one reason which, if there were no others, we would rely on in confirmation of this sentiment, that no deed is void if it may be for the infant's benefit, may be seen in the acknowledged fact which seems not to be doubted by any, that all such deeds may be confirmed, which could not be the case if they were void: "*Nam quod ab initio non valet, in tractu temporis non convalescet.*"

A parol lease by an infant is not void: 1 Modern, 25. Comyns, on the authority of the dictum in *Thompson v. Leach*, and of Perkins, sec. 13, lays it down that the bond of an infant is void. By looking into these cases, it will be found that the word void only means "not binding," or, in other words, "voidable." In the case in Cro. Eliz. 920, it is evident that the reporter uses the word "void" in the same sense as "voidable." In *Thompson v. Leach*, 2 Salk. 675, the court says: "The bond of an infant or *non compos* is void, because the law has appointed no act to be done to avoid them." Thus plainly showing by the reason assigned that such bonds are only voidable; and so it is of all or nearly all the cases which use the word void, in reference to deeds and bonds of infants and persons *non compos*. The application of one test alone will undeniably prove it. All those acts may be ratified or confirmed after the removal of the disability, without any new consideration; and in all of them the adult and the sane party is bound, though the infant and lunatic may avoid. The references already made clearly show this, in addition to which the following are cited: "If an infant

after age promise to pay a bond executed when an infant, he is bound:" 2 T. R. 776. " This could not be if the bond had been void:" Cro. Eliz. 700.

In Cro. Eliz. 920, it is said that a penal bond by an infant, for necessities, is " void;" but that a single bond is " valid." It is obvious that the court mean that the penal bond is voidable; and this will be self-evident by scrutinizing the case as stated by Coke. It shows that a single bond for necessities can not be avoided, but that a penal bond may be, and, therefore, is not binding until ratified or assented to after the infant is twenty-one, and, consequently, is voidable. Some of these cases show how carelessly the word void has been used. A security given by an infant for another is only voidable: 2 T. R. 766. A lease by an infant without reservation of rent is voidable only, and he can not plead *non est factum*: Noy, 130; 2 Inst. 483; 5 Co. 119. See, also, some of the foregoing authorities showing that the adult party is bound. An unequal petition is only voidable Co. Lit. 171. If any of the contracts of infants shall be held void, it should be such only as, not apparently, but necessarily, operate to his prejudice: 13 Mass. 240; 14 Id. 461.

A deed of bargain and of sale by an infant is not void, but only voidable: 6 Mass. 78; 1 N. H. 73. Without amplifying more, it seems to the court that it is authorized to deduce from the cases cited, and the principle involved in them all, when analyzed, the following conclusions: First. The fact of title passing by delivery of the deed, or of the thing granted, is not more essential in considering whether the deed of an infant or *non compos* be void or voidable, than it would be in the case of an adult and sane person. Second. Nor is the semblance of benefit material as an exclusive criterion. Third. If " the delivery " be a proper test, it is the delivery of the deed and not of the thing granted. Fourth. But the rule laid down by Mansfield seems to be the only just, rational, and consistent one; that is, that none of the contracts of infants are void, except such as those in which it would be better for the infant, as a general principle, that they should be void than voidable. Fifth. No contract of an infant or *non compos* is void if it can be confirmed or is binding on the other party to it; and the cases cited to prove that deeds and bonds of infants, etc., are void, prove, when subjected to this test, that they are only voidable. And, surely, the doctrine could not be tolerated in this country, that all deeds by infants are void, and binding neither on them nor the other parties to them.

But such must be the consequence, if all are void that do not pass title by livery of seisin; for there is no livery here. And if the delivery of the thing were necessary in the case of a deed, it would be equally so in other contracts. It would be equally preposterous to decide that bonds and other contracts of infants are void, unless they exhibit the semblance of benefit. If any such contract be void, it is only such as can not possibly be beneficial to the minor party. The privilege of infancy being personal, the other party to contracts with infants are, and should be, bound. It is enough for the protection and security of the infant, that when he acquires legal discretion he may avoid or affirm contracts made when an infant. And this security is increased by not permitting an adult party with whom an infant contracts to treat such contract as a nullity. Bind the other party, but leave the infant free. This is the doctrine of the books. It is the dictate of reason, and is the only maxim that accords with the privilege of infancy. There may be exceptions, as stated by Mansfield. But if on a deed the proper test be the delivery, the foregoing considerations and citations are deemed sufficient to prove that on that hypothesis the deed in this case is voidable only; because the right passed by delivery of the deed, not of the land.

If the possibility of benefit be the proper test, then the deed in this case can be no more than voidable, for it was evidently beneficial. And if neither should be the test, as we should say (in the absence of authority), of course the deed is not void.

The next question which occurs, is, can the appellee (admitting the insanity) be permitted to take advantage of it? Privies in blood and in representation may avoid the voidable deeds of infants and lunatics. All the authorities, without any contrariety, concur in this. But whether purchasers have the same privilege, has not been certainly ascertained by the same unvaried uniformity of opinion. Their right will depend on what is meant by the authorities which decide that privies in estate can not avoid. The words "are voidable by himself, by his heirs, and by those who have his estate," in the twelfth section of Perkins, on the effect of deeds by infants, have received different constructions. Some judges have supposed that he meant by the words, "who have his estate," those who hold by purchase, in contradistinction to heirs. This was the opinion of the supreme court of New York, in the case of *Jackson v. Burchin*, 14 Johns. 127. The only reason assigned by the court for this construction is that in *Zouch v. Parsons*, and in *Shep-*

herd's Touchstone, 233; the twelfth section of Perkins is recognized as sound law.

But Mansfield and Shepherd have not said that the phrase, "who have his estate," means purchasers. They say nothing about this. They refer to Perkins to prove only that a deed, passing by delivery, is only voidable. And it is very evident that the expressions last quoted from that section are susceptible of other constructions than that given by the court of New York, as will appear, not only by an analysis of the whole section, but the authorities, which would apparently establish another and different doctrine. Therefore, as the opinion in 14 Johnson seems to be founded on a misconception of Lord Mansfield and Shepherd, and assign no other reason in its support than they had said, what they never did say, it should not be regarded as entitled to much influence on this point. 1 Fonblanque, 50, 51, asserts that neither privies in estate nor by tenure, can avoid the deeds of infants or lunatics, and he is supported in this opinion by 4 Coke, 124; 8 Id. 42, b, *Whittenham's case*; Newland, 19; Jacob's Law Dict. title Infancy; Highmore, 114; and other authorities. Jacob, after quoting the expressions from Perkins (those who have his estate), says, "but privies in estate, such as the donor of an estate tail, etc., and privies in law, as the lord by escheat, shall not avoid," etc.; and Highmore suggests that the right to avoid the deeds of persons *non compos*, is founded on the statute of 17 Ed. II.; which declares that "after the death of such idiots he (meaning purchaser) shall render it (the estate) to the right heirs, so that," etc.

None of these cases use the word purchaser. But in exemplifying their doctrine they mention as privies in estate, by tenure in law, only remainder-men, tenants, lords of escheat, and others of the same kind. The decision in Johnson, so far as it applies to a purchaser, may be reconciled with these apparently opposing authorities, and Perkins may mean purchasers in the language quoted. We think he does. The case cited from Johnson was one in which an infant who had made a deed to A., after he came to the age of twenty-one conveyed the same land to B., and the question was, whether B. could take advantage of the infancy. It was decided that he could; because, in the language of the court, Perkins, in the twelfth section, laid it down that privies in estate had that right. Although the court may have erred in this construction of Perkins, and thus gave a reason for its opinion, which was too compre-

hensive, yet we concur in the opinion that the last purchaser might avoid, not because a privy in estate may avoid, but because a privy by contract or representation may, and such is a purchaser.

None of the cases in which it has been held that privies in law and in estate can not avoid the voidable deeds of infants and lunatics have mentioned, or by their terms include a subsequent purchaser from the person laboring under the disability. And we are of the opinion that when they speak of privies, who are not allowed to avoid, they do not mean such purchasers; but such persons as hold by privity of estate alone. Privies in estate strictly mean those only between whom there are certain rights and relations resulting from the estate held, and not from contract between them. Such a privity in estate or in law exists between a lessor and a sublessee, a vendor by deed of warranty, and a remote vendee or assignee, the lord by escheat, and the terretenant, etc. In such cases there is no right or obligation between these parties growing out of any contract between them. All their rights as between themselves are created by the privity of estate. But it is not so between the lessor and his lessee, the vendor and his immediate vendee. The rights and obligations which subsist between these are produced by their contract principally. There is no privity of estate between lessee and assignee: 1 Salk. 317. It is only where an interest in the same estate, without any contract between the parties, called privies in estate, constitutes them privies, that they can, with strict propriety and precision, be denominated privies in estate. And although there can be a privity of estate and of contract between the same parties, the authorities which maintain that "privies in estate" can not avoid the deeds of infants, etc., must mean those only whose privity is exclusively that of estate. Blackstone, in the second volume of his Commentaries, page 355, says privies to a fine are such as are any way related to the parties who levy the fine and claim under them by any right of blood, or the right of representation; such as are the heirs general, of the cognizor, the issue in tail, since the statute of Henry VIII.; the vendor, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act of the principal, his substitute, or such as claim by any conveyance made by him subsequent to the fine levied. The same doctrine is affirmed in Coke, 87. And Blackstone says, in the same book, 2 Comrs. 291, "clearly the

next heir, or other person interested, may, after the death of the idiot, or *non compos*, take an advantage of his incapacity and avoid the grant." He means by "other persons interested," the personal representative, or any one who has acquired a right to the estate from the idiot, or *non compos*, by contract after the deed sought to be avoided. Of this there can be no doubt. "If a lessor grants his reversion, the grantee and lessee are privies in estate; privies in contract extend only to the persons of the lessor and lessee, and where the lessee assigns all his interest, here the lessor and lessee remain privy in contract, but not in estate, which is removed by assignment." Jacob, title Privies, and 3 Co. 23.

It is evident to us, from these extracts, if there were no other reason for it, that when the cited books speak of "privies in estate," they do not mean to include as privies the vendor and his immediate vendee. And these authorities also show that a purchaser or devisee, holding his right from the infant or *non compos*, derived after the attainment of legal discretion, or restoration to sanity, may avoid a deed made for the same estate during disability. Without these authorities we should be of this opinion, and decide that the cases which have declared that privies in estate can not avoid apply only to those between whom and the infant or lunatic there is only a privity of estate, and not a privity of contract. There is no reason why a purchaser from a person who had conveyed the same estate previously, and when an infant, shall not have as much right to avail himself of the disability, as the heir or executor of the infant has. Indeed, there is plainly much reason for his having a stronger right. He has paid the value of the estate; they have given nothing. If he had not bought it, they might have reclaimed it from the purchaser from the infant; or the infant might have obtained a restitution himself. By his purchase after the removal of the disability, he has given the value of the estate to his vendor, and which inures to the benefit of his heirs and personal representatives; as they might have recovered the estate, if he had not bought it, and have virtually done so by receiving from him its value, why should he not hold it? He certainly has as good a right to it as if the heir, or his ancestor, had expressly avoided the deed made during infancy, and afterwards sold it to him. Besides, the deed to him conveys all the right that the vendor had. As the vendor had a right to avoid the former deed, certainly the vendee has acquired the same right. Why should not such a purchaser

have equal rights with a second mortgagee, an assignee, or a creditor? Moreover, the last deed made after the infant was twenty-one, avoids that made during infancy. An infant must, while an infant, avoid an act done in a court of record, but an act "*in pais*" can only be avoided effectually after he is twenty-one; because, when he becomes twenty-one, he may confirm it, although before he may have attempted to avoid it. How is an infant to avoid a deed? Certainly, after he attains the age of twenty-one, he may, by an act expressing his assent, confirm; and, of course, an act done after twenty-one, of as much solemnity and dignity as the deed evincing his disaffirmance, will necessarily have the effect of avoiding it. And this is expressly so decided in the case cited from 14 Johnson.

If, therefore, the deed made after the disability shall have been removed, *per se*, avoids one made to another before its removal, the vendee in the last deed can hold the estate conveyed to him, by showing the fact that when the first was made a disability existed, which rendered it voidable; and for which it has been avoided by a subsequent deed to him, and he must, therefore, hold the estate, unless the other can show a confirmation before the date of the last deed. This alone is decisive. And this, too, is positively asserted by Blackstone in one of the foregoing extracts. There is another consideration to prove that the vendor and his vendee are not considered as privies in estate, in the sense which that term is contended by some to have in the cases which affirm that privies in estate can not avoid. Whenever a suit is brought on the mere privity of estate it is local. And it has never been intimated that a suit by the vendee against his vendor is local. It is undeniably transitory. It is a suit on the contract, and not on the privity of estate. But the same authorities show that suits by privies in estate are local. Therefore, the conclusion is inevitable that when they say that privies in estate can not avoid the deeds of infants, etc., they mean only such as those mentioned by them, to wit, the lessee and grantee of the reversion, the donor and the remainder-man, etc., etc., who acquire no right from the infant or *non compos*, do not represent him by contract, are not his substitutes; but hold and claim either by operation of law, or by the gift or grant, in which the infant or *non compos* has had no active or voluntary agency.

The lord, by escheat, does not claim by any act or contract of the deceased holder. He does not derive title from him; nor does the remainderman, nor the grantee of the reversion, hold

from the tenant of the particular estate or the lessee, by any contract with them, or in consequence of any act done by them. Between such parties there is no right excepting what results from mere privity of estate or of law, and therefore some are called privies in law, and some privies in estate. They are not privies in contract or in representation, as the purchaser is. And we have been unable to find any case which intimates that a subsequent purchaser may not take advantage of the infancy of his vendor, and by pleading the disability, avoid the estate conveyed by the infant to another, when the vendor labored under a disability which rendered it voidable.

Hence, we conclude that the apparent discrepancies in the authorities on the subject do not in fact exist, or may be easily reconciled; and therefore concur in the opinion in 14 Johnson that a purchaser may avoid the deed which his vendor might avoid; and that by conveying to him, the vendor for himself has avoided it. This opinion in Johnson is, we have no doubt, sound law, although the reason for one branch of it is misconceived. But it may be said that lunatics can not stultify themselves, and therefore can not, like infants, avoid their deeds; and consequently that purchasers from them can not avoid them. This is specious, but no more. Whether a person *non compos* may or may not plead his disability, is in our opinion yet a "*questio vexata*," which, without any violation of our judicial duties, we might decide either way. The reason and equity of the case are on one side; the weight of more ancient authority on the other. But the hard and arbitrary interdiction enforced by some ancient *dicta*, and acquiesced in by some more modern cases, and in Kentucky too, has been relaxed, where it originated, more and more, as light has been diffused; and the only question on this point would be, whether the doctrine is so inflexibly settled against the lunatic, that "*nolens volens*" we shall be bound to recognize it as the fixed law. This we shall not now decide, because it is not necessary to do so in this case.

Whether a *non compos* can avoid his own deed or not, his heirs and representatives may. And we see no reason why a *bona fide* purchaser from him may not. The equity and reason of the privilege apply to a purchaser as well as to an heir. Although the lunatic may not be permitted to benefit himself by disaffirming a deed made by him under mental disability, his subsequent deed to a purchaser, after a recovery of sanity, indicates his dissatisfaction with the former one; and although it may not, as in the case of infancy, avoid the first deed, it

vests in another as much right to do it as the heir can possess. And the authority of one of the extracts from Blackstone seems decisive on this point. For the expression "heir or other person interested," can mean nothing else than the heir or other person who shall have acquired from the *non compos* an interest in the estate conveyed.

We are therefore of opinion that the appellee in this case, as purchaser, has the same right to plead the lunacy of Walter Beall as the heirs of Walter Beall would have. But can such a plea be availing to either the heirs or purchaser? It can not; because the deed to Breckenridge in 1802 (when it is admitted that W. Beall was not disabled), is a confirmation by Beall of that made in 1801; and Ormsby's is posterior in date, to wit, in 1804. Any act which shows assent, especially a recognition in a subsequent deed which (as that of 1802 does) refers to and describes the voidable one in a manner to evince an acquiescence in it, is a valid and irrevocable confirmation: *Bac. Abr.*, title *Infancy*; 15 *Mass.* 220; *Gilb. Ten.* 75; 11 *Johns.* 542; *Reaves' Dom. Rel.* 240; *Philips v. Green*, *Man. of C. Appl's.*

Beall's heirs, and all claiming under him, by purchase since 1802, are estopped by the recital in the deed of 1802, from pleading his lunacy to avoid the previous deed of 1801. The mortgage of 1802 recites that that of 1801 is given for the same property, states that it is sufficient for the payment of the debts to be secured by each, and certainly is an effectual waiver of all right to avoid the first. Besides, as each deed was executed to Breckenridge, whenever the estate is sold, at his instance, or that of his representatives, to satisfy the first mortgage, all title passed by the deed of 1802 to Breckenridge inures to the purchaser under the decree. For Breckenridge can not sell the estate to pay one debt, and still hold a lien on it to secure others. The whole title is sold, and title is a unit. The alleged lunacy of W. Beall, therefore, in 1801, can not benefit Ormsby, by enabling him to avoid the deed of 1801. And he can not complain; because he had, when he purchased in 1804, either actual or legal notice of all the mortgages; and certainly had notice of them when he purchased, at the commissioner's sale, the same property the second time.

The fact that the appellants were willing, when the first decree was rendered directing the sale, to accept commonwealth's paper, can not benefit Ormsby. They had to get another decree, and that directed the sale to be for specie. The creditors were under no obligations to take bank paper. The sale is

good. Nor can any alleged defect in the proceedings in the suit for foreclosing the mortgage benefit Mr. Ormsby. Waiving the very questionable attitude in which he presents his claim for relief, after an unsuccessful attempt to avoid his purchase under the decree in the circuit court pending the suit in chancery; the fact of his making the purchase on such a judicial sale, and the additional circumstance that his property, after judgment on his bond for the price bid by him, has been sold to satisfy that judgment, nevertheless, without any of these objections to the relief sought by him, which would be very cogent, the decree which he seeks to avoid opposes an insuperable barrier. If the court had jurisdiction, and such parties were before it, as to enable it to decree at all, no defect of parties or other irregularity can authorize this court, or any other, incidentally to call the decree in question, or consider it in any other light than that of a final and conclusive decision between the parties to it, until it shall be reversed by the appellate court in a direct proceeding for that purpose. Nothing appears which can show want of jurisdiction in the circuit court of Fayette.

It is true, if none of the defendants reside in Fayette, as the mortgaged property was elsewhere, the court would have no jurisdiction of the case. But unless both the realty and the persons were out of that county and fixed in some other, the court had jurisdiction. A bill to foreclose is *in rem* and *in personam*. And either the thing or person of the defendant gives jurisdiction. Now, although the fact may be that none of the defendants reside in Fayette, it does not necessarily so appear in the record. Process is executed on one of them in Fayette. And there is no evidence in the case which would authorize this court to decide judicially that Samuel Beall, on whom the sheriff of Fayette served a subpoena, or Norborne B. Beall, who acknowledged service (and both of whom answered), were not resident in Fayette. The answers do not deny the jurisdiction on any such ground, nor could the plea of residence be material, unless the Bealls had been served with process out of Fayette. There were certainly both complainants and defendants enough to make a case fit for adjudication, and although there may be others who might, and perhaps ought to, have been made parties, and although for this defect the decree might possibly be liable to be reversed, such a defect is not sufficient to invalidate it in the collateral and indirect mode attempted. It would have been more regular to have made the trustees for Samuel Beall, defendants. But this was not necessary. Because, 1. They were

only nominally interested, the beneficial interest being in Beall's heirs, who were defendants; and, 2. The time which had elapsed from the date of the trust, and the tacit admission of Beall's heirs that it had been fulfilled, are sufficient to authorize the presumption that it was extinguished. S. Beall's heirs are, at all events, estopped now to set up any claim under the trust, and of course that deed can not render the right of Ormsby more insecure than it would be without it: Bul. N. P. 110; 3 Bro. 289; 3 P. Wms. 287; 7 Johns. 283; 3 Id. 386; 12 Id. 242; 5 Johns. Ch. 552.

It would also have been more regular to have made Breckenridge's heirs parties. But this omission can not render the decree a nullity. The mortgage was only a collateral security. Anything that assigns or extinguishes the debt, transfers or discharges the mortgage deed: 2 Marsh. 109; 2 Burr. 978; 11 Johns. 534; 15 Id. 319. Where a mortgage is paid off, no release is necessary to reconvey the title to the mortgagor: 18 Johns. 7; and it would seem from this case that it is not essential that the payment should be before breach of the condition. A payment of the mortgage debt extinguishes the mortgage at law as well as in equity. The mortgage is but a chattel interest. The right to the money passes to the personal representative of the mortgagee, and his receipt of the debt is good against the heir. The wife of the mortgagor is dowable, and the wife of the mortgagee is not, even after forfeiture. The estate mortgaged may be sold to pay the mortgagor's debts, but not for the debts of the mortgagee. The debt can not be separated from the mortgage. The mortgagee, after forfeiture, may maintain an ejectment against the mortgagor to recover the possession of the estate mortgaged, that he may have the benefit of the profits. But the legal title, *pro forma*, is vested in the mortgagee after forfeiture for the sole purpose of securing his debt. He can not sell or assign the estate without parting with the debt, and it seems to result, necessarily, that by an extinguishment of the debt, *ipso facto*, the perfect legal title relapses to the mortgagor. It is not doubted that a payment of the debt before forfeiture extinguishes the mortgage at law.

But there are many learned judges who doubt whether a payment after a forfeiture will have the same effect. On this point, there is great diversity in the cases reported, as well as in the "*auctoritas prudentum*." But ever since the days of Hardwicke, the opinion has grown more and more prevalent

that a payment, at any time before the title has been passed to the mortgagee by a decree or sale, will *per se*, at law, as it will in equity, divest the mortgagee of all title. In support of the foregoing propositions, see 4 Johns. 42, 43; 2 Bur. 969; Doug. 630; Id. 455; 6 Johns. 294; 7 Id. 278; 10 Id. 381; 7 Mass. 139; 5 Johns. Ch. 552, 570, 454; Tullee, 185, 186; Pow. on Mort. 683. A stranger can not set up the title of a mortgagee as an outstanding title: 6 Johns. 290; 7 Id. 278; 10 Id. 381. A conveyance by the mortgagor, with covenant of seisin, before foreclosure, or possession taken by the mortgagee, is no breach of the covenant in his mortgage: 7 Johns. 376. The mortgagor in possession may maintain trespass against the mortgagee for an entry on the mortgaged estate after forfeiture; and if the defendant plead *liberum tenementum*, the mortgagor may reply that the freehold is in him: *Runyan v. Mercereau*, 11 Johns. 534.¹

The foregoing propositions, which are affirmed and undeniably sustained by the authorities which we have cited, leave us no just ground for resisting the conclusion that a payment of a mortgage debt, whether before or after forfeiture, is, in law as well as in equity, an extinguishment of all title in the mortgagee to the estate mortgaged; and that, consequently, no reconveyance in either case by the mortgagee, or his heirs, is necessary to perfect the title of the mortgagor or of a purchaser under a decree of foreclosure and sale. Either a payment, or a sale by decree, would seem sufficient. If we are mistaken in some of the reasons for this opinion, still, as the executor of the mortgagee has a right to the debt, if he sue in chancery and obtain the amount of it, by sale of the property the heir is bound, because he is represented "*quo ad hoc*," by the executor, and it would, therefore, seem that the title of the heir passed. The mortgagor may maintain a bill against the mortgagee, or his heirs, for a release or reconveyance after payment. But this is not because the payment is not an extinguishment, but only because the fact of payment may not be, at all times, conveniently susceptible of proof without written or record evidence. Such a bill, in such a case, is filed as a precautionary measure. But the fact of payment is sufficient, if it can be made to appear without a reconveyance, particularly if it be manifested by a decree of court. In this case, the final decree which will be rendered, and the former decree, under which the lot was sold, will be ample and indisputable evidence of the

1. *Runyan v. Mercereau*, 11 Johns. 534 [6 Am. Dec. 393].

payment of the mortgage debt, and the consequent extinguishment of the title of Breckenridge's heirs. The executors of John Breckenridge have a right to receive the money. The heirs not only assent to their receiving it, but in this suit insist on it. If, therefore, they could have any legal right to the lot, after the payment, they have waived it, and will forever be estopped by this record, from asserting it.

We are therefore of opinion that Breckenridge's heirs were not necessary parties, although it would have been more proper, for the prevention of future contests or doubts, to have made them parties. But if we shall be mistaken in this opinion, nevertheless, the decree was not a nullity, and can not be disregarded by the court in this case. If Ormsby's title would not be secure without a conveyance by Breckenridge's heirs, still the sale should not be canceled, unless it could be shown that he could not procure such a conveyance. He would only have had a right to go into chancery to obtain a release by the heirs. As, therefore, in this suit, in which they are parties, they seem to waive all pretense to any claim to the mortgaged property, and as a reconveyance may be decreed if desired, so as to remove the most fastidious objection to the title of Ormsby, no ground is furnished, in any aspect of the case, for perpetuating the injunction. If Ormsby desires a release by the heirs, he can have it, and then there could be no objection to enforcing his contract of purchase.

The decree of the circuit court is, therefore, reversed, and the cause remanded with instruction to dissolve the injunction, and decree a release by Breckenridge's heirs, if Ormsby ask for it. But as he did not file his bill to obtain title, nor complain in it that he could not get it, and as he has, in our opinion, all the right that ever vested in W. Beall or J. Breckenridge, and as good a one as Breckenridge's heirs can make to him, he must pay the costs in this, and in the circuit court.

Petition for a rehearing presented and overruled.

CONTRACTS OF LUNATICS, WHETHER VOID OR VOIDABLE.—This subject will be found discussed at length in the note to *Jackson v. King*, 15 Am. Dec. 361-369, and the conclusion there arrived at is that such contracts are voidable, and not void, particularly if made prior to office found.

DELIVERY, WHAT CONSTITUTES.—The authorities in this series will be found collected in the note to *Barns v. Hatch*, 14 Am. Dec. 371, upon what is sufficient to constitute a delivery.

INFANTS' CONTRACTS are voidable, not void: *Oliver v. Houdlet*, 7 Am. Dec. 134, note 136; *Whitney v. Dutch*, Id. 234, note. When and how such contracts may be avoided: See note to *Philips v. Green*, 13 Id. 131.

VANADA'S HEIRS v. HOPKINS' ADMINISTRATORS.

[1 J. J. MARSHALL, 235.]

CONSTRUCTION OF POWERS GIVEN AGENT.—A person may act by an authorized agent, but all powers conferred must be construed with a view to the design and object of them, and the means most usual and proper for carrying their design and object into effect, due consideration being given to the language employed.

COURTS NOTICE, EX OFFICIO, the fluctuations and mutations in language.

POWER BEING GIVEN TO DO A THING, the means to accomplish it are necessarily granted. A power "to sell" land, implies the power to bind the principal to convey with general warranty, and authorizes the agent to bind his principal, by writing, to make the purchaser a sufficient deed upon the purchase-money being paid.

AGENT EXCEEDING HIS AUTHORITY, WHEN CONTRACT MAY BE ENFORCED.—

If an agent in selling land adds covenants not authorized by his authority, the purchaser may enforce so much of the contract as conforms to the authority, or claim a rescission of the whole if the principal will not enter into the covenants.

BILL in chancery for a specific performance. Error to the Henderson circuit. The opinion states the case.

Crittenden and Denny, for plaintiffs.

Mayer, *contra*.

By Court, UNDERWOOD, J. The chief question in this cause turns on the validity of the acts of Samuel Hopkins, deceased, acting in the character of attorney in fact for Walter Alves. On the twenty-seventh of September, 1807, Alves executed a power of attorney, vesting authority in Hopkins to sell four hundred and ninety-four and three-fourths acres of land in Henderson's grant; "also all his, said Alves', part of share of the northwest quarter-section of lot No. 5, north of Green river, in said grant, being the same that was allotted to James Hogg by the company in the deed of partition, forty-one forty-eighth parts thereof being by him conveyed to George Hogg, and by him to said Alves. The deeds which show the above conveyances being recorded in the office of Henderson county, the legal title to the remaining seven forty-eighth parts still remaining in the heirs and representatives of said James Hogg, of whom said Walter is one," etc. The power proceeded as follows: "And I authorize my said attorney to sell my said forty-one forty-eighths of said lot, say eight hundred and forty-five acres, as it is at present undivided, or to obtain any equitable division thereof, agreeably to law, and sell it all together or partially, as he may think best; and I further empower said Samuel Hopkins to sell for credit or otherwise, and for such sums of money as he

may think proper, and I do hereby bind myself to ratify and confirm whatever my said attorney shall legally do in my name, in virtue of the premises." On the thirteenth of October, 1808, said Hopkins, "for himself, and as attorney for Walter Alves," entered into a contract with Martin Vanada and Charles Winpee, in which it is stated that, "Hopkins, for himself, and as attorney, etc., hath sold all the land they own or possess in Henderson's grant, in lot No. 5, on the north side of Green river, lying north-east of a line to be run across the said lot No. 5, to begin at Griffith's pond," etc. The agreement further says: "Samuel Hopkins obliges himself, his heirs, etc., for himself, and as attorney as aforesaid, to make or cause to be made to them, to wit (Vanada and Winpee), a good title in fee-simple to the said lands, with general warranty," and it is signed and sealed thus: "Samuel Hopkins, for himself, and as attorney for Alves." [Seal.] The contract between Hopkins, for himself and attorney in fact for Alves, and Vanada and Winpee does not specify any certain quantity of acres as having been sold, but Vanada and Winpee were to have all the land owned by Hopkins and Alves included within the boundaries of lot No. 5, lying north-east of a line to run across said lot No. 5, "to begin in Griffith's pond," etc. A survey having been executed to ascertain the quantity, it was found that there were three hundred and twenty-five acres, which the bill alleges were sold by Hopkins as attorney in fact for Alves. Hopkins and Alves being dead, and neither having conveyed the land to Vanada (who, by a division of the land jointly bought by him and Winpee, had become entitled to the said three hundred and twenty-five acres), he filed his bill against the heirs of Alves and Hopkins and the administrator of Hopkins, with a view to have a specific exemption of the contract, and for general relief. The heirs of Alves do not resist a specific execution of the contract upon any plausible ground, other than the want of authority on the part of Hopkins, under his power, to bind them or their ancestors by the contract as made and entered into with Vanada and Winpee. The points relied on by them are: 1. That the power of attorney did not authorize Hopkins to sell less than Alves' entire interest in lot No. 5, without first having procured a division and a severance of his interest from that of his co-tenants, in which event it is conceded he might have sold less than the entire interest; and, 2. That the contract, as signed by Hopkins, does not impose any obligation on them or their ancestors.

In relation to the first point, the defendants, heirs of Alves, insist that Hopkins departed from, and exceeded his power, and consequently that his acts are void. We readily admit, that whatever act an agent does, unauthorized by the authority vested in him, is not binding on his principal, and we also concede that agents may be limited and restricted to specified and particular acts, so that they may be deprived of all discretion. To enforce these doctrines, it was useless to cite authority. They are based upon the common sense of all men, and engrafted in every civil code; and were it otherwise, the principal's most valuable rights might be sacrificed by the ignorance or wickedness of an agent, in whom the principal had no intention to vest any discretion, or to give any power, but to carry into effect positive instructions. Whenever one man presents himself as the agent of another, it is the duty of all who may have transactions with him, in his representative character, to inquire into the extent of his authority, and they must deal with him at their peril.

But all powers conferred must be construed with a view to the design and object of them, and the means most usual and proper for carrying their design and object into effect, having respect to the language which the maker of the power employs to convey his meaning and intent. The language of all nations is liable to fluctuate with the changes that take place in the progress of time, in their affairs and condition. A word or a phrase which has a definite meaning, and which will be universally understood in the same sense by all who speak the language, from various causes, may lose its original signification, and ultimately have a meaning attached to it essentially different. It is the duty of courts to take notice of these mutations in language. Without doing so, they can not observe the great and paramount rule of effectuating the intentions of men in all their transactions. Accordingly, in the case of *Lampton v. Haggard*, 3 Monroe, 149, this court have interpreted the expressions "Kentucky currency" and "currency of the state," which are equivalent, to mean very different things at different times.

Had Hopkins authority vested in him, by the power to sell less than the entire interest of Alves in lot No. 5? If he had not, then he has conferred no right on Vanada, and imposed no obligation on Alves. The question must be answered by construing the power according to the rule prescribed; that is, with a view to the design and object of the power, and the means most usual and proper for carrying the design and object

into effect, ascertaining these by the popular significance of the language employed at the date of the power, by its maker, to convey his meaning.

The first sentence in the power, relative to lot No. 5, authorizes Hopkins to sell all Alves' part or share of the north-west quarter-section of lot No. 5. Were this the only sentence in relation to this land, there could be no doubt of Hopkins' authority to sell, not only the forty-one forty-eighths conveyed to him by George Hogg, but also the interest he held in the residue, as one of the heirs of James Hogg. By subsequent sentences, the power states that the attorney may sell forty-one forty-eighths of said lot, say eight hundred and forty-five acres, as it was undivided; or to obtain a division and sell it altogether, or partially, as he may think best. It is contended that those last sentences qualify the first, and deny to the attorney the power to sell the interest of Alves, held as one of the heirs of James Hogg, and also confine the attorney to making a sale of the whole eight hundred and forty-five acres, as it stood, undivided, at the date of the power, to one or more purchasers, in a single contract, at the same time, or to a sale of Alves' interest altogether, or in parcels, after a division shall have been obtained. There is no express declaration on the face of the power, which shows an intention on the part of Alves to limit and restrict, by these latter sentences, the operation of the grant of the power in the first instance, to sell the entire interest. The argument in favor of such restriction is founded on the supposition that the authority to sell, in the particular manner pointed out, excludes the idea that a sale can be effected in any other way. We are of opinion that the maxim, "*expressio unius est exclusio alterius*," does not apply. Such a construction would tend to nullify the grant of power to sell the entire interest first given, which does not prescribe any rule for the government of the attorney in selling. All the grants of power can stand together by a construction of the instrument giving effect to all its parts, and one more congenial with the intention of Alves, to be collected from considering the general import of the whole instrument, than that contended for by the appellant's counsel; it is this: as authority had been previously given, without any restriction, to sell four hundred and ninety-four and three fourths acres, part of Thomas Hart's lot No. 7, and as the first sentence in relation to his (Alves') interest in lot No. 5 is equally extensive, and as the authority to sell both is so far placed upon the same footing,

he intended to make no difference between them; but as others had a very small interest with him in the last tract, he gave the power to have their interest separated from his, if the attorney should deem that trouble and expense incident to it, useful in the accomplishment of the object in view, to wit, the sale of the land; and added the expression, "sell it altogether or partially, as he may think best," not for the purpose of restricting power already vested, but to satisfy all purchasers that in any event, his attorney in fact was completely authorized to sell, without restriction. Moreover, as the heirs of James Hogg owned a small part of the land, purchasers might make that an objection; if so, Hopkins was vested with power to obviate it by procuring a division.

Hence, the power to procure a division was inserted, though abundance of caution to enable the attorney to obviate difficulties which might be started by those wishing to purchase, without any intention to limit the general power to sell, previously vested. This view is fortified by the unlimited discretion given Hopkins as to price and credits. Believing that there is no less authority in Hopkins, by the power to sell Alves' interest in lot No. 5, than there is to sell his interest in No. 8, it is still to be decided whether Hopkins could lawfully sell a smaller quantity than the entire interest. This brings us to the consideration of the means which may be employed to effectuate the power.

When a power is given to do a thing, the use of the means to accomplish it are included and necessarily granted likewise. These, according to the rule already prescribed, should be such as are most usual and which are proper to accomplish the thing intended to be done. They should be such as are ordinarily used by prudent, discreet men in doing similar business. The courts must notice the transaction and business of society, and from their knowledge, *ex officio*, determine on the usual and proper adaptation of means to accomplish an end for which power is vested in an attorney in fact. Hopkins was authorized to sell two tracts of land, one of four hundred and ninety-four, the other of eight hundred and forty-five acres; was he bound to sell by entire tracts? His letter of attorney does not so direct. Is it usual for those wishing to sell lands, having so much in a body, to sell by entire tracts, or to divide them so as to suit purchasers, leaving the part unsold in convenient form for future sale, when a purchaser may present himself? We have no doubt such has been the common practice of prudent,

discreet men in managing their own estates; and if so, an agent acting under a general power to sell, may do the same thing.

The situation of the country affords strong reasons in support of such practice on the part of owners and their agents. Two hundred acres of land will make a comfortable farm; a large portion of the landholders of the country do not own more, and many who wish to buy land are not able to pay for more. Unless, therefore, Hopkins had power to sell less than an entire tract, he was placed by his principal in a condition in which he was unable to act according to the circumstances by which he was surrounded, and the general practices of the country. To put such a construction on the power as would result in a denial of the usual means to accomplish the end, would be to make the power ineffectual. We have no doubt but it did authorize Hopkins to sell either tract in parcels, and that his discretion was confided in as it respects the quantity of either tract he might sell. It is conceded that there are many cases where an agent would not be authorized to divide and cut up the thing to be sold, but that he would be bound under a general power to sell the entire thing. The principles already advanced indicate when it would be proper to take the one course or the other.

We do not coincide with the circuit court in the opinion that Hopkins had no authority to sell less than the whole eight hundred and forty-five acres until Alves' interest was severed from that of his co-tenants. But it is urged that Hopkins sold to Vanada and Winpee three hundred and twenty-five acres, by metes and bounds, and thus he sold land which in part belonged to James Hogg's heirs, as no division had been effected between them and Alves. This view of the subject is not warranted by the written contract entered into between Hopkins, Vanada, and Winpee. By that contract, Hopkins, for himself and Alves, only sells the land they owned or possessed in lot number five, north-east of a line to be run across the said lot, etc. If James Hogg's heirs had any interest in lot number five, north-east of the contemplated line, they retain it yet, and we perceive no objection to decreeing a conveyance of Alves' interest, north-east of that line, to Vanada's heirs, and leaving them and Hogg's heirs to settle their interests in common, if such shall be created, upon the principles of law applicable to such cases.

The contract signed by Hopkins states that the conveyance is to be made by deed, with general warranty. It is contended

that this is unauthorized by the power, and 7 Johnson, 390, and 5 Johnson, 57, are relied on as authorities to establish the position. The case in 7 Johnson was that of an authority given to sell a ship. It was special. The agent practiced a fraud in the sale, and the question was, whether the principal was liable for it. The court held the negative, and very properly. A special delegation of power to sell a ship in the same manner that the owner might, gave no authority to practice a fraud for which the principal would be liable. The agent, therefore, having exceeded his authority, was responsible for his fraud, and not his principal. There is a distinction between the acts of a general agent, constituted by parol, and known by his general conduct in the business of his principal, and those of a special agent with power to do a particular act; a power to make representations is said to be necessarily implied by such general agency, and if they be falsely and fraudulently made, it is said the principal shall be answerable. In these doctrines we find nothing decisively applicable to the present case. They have grown out of mercantile transactions, and there is strong reason for holding the principal liable for the frauds of his agent in all cases where an authority to make representations can be implied.

The case in 5 Johnson is more analogous to the present. In that case, it was held that an authority to sell and to execute conveyances and assurances in the law, of the lands sold, and where no power was given to bind the principal by covenants, that a covenant of seisin inserted in the deed executed by the attorney, was void. The reason assigned for it by the court is, that as a conveyance or assurance is good and perfect, without either warranty or personal covenants, they are not necessarily implied in an authority to convey. There is no reference to authorities in support of this case, and it may be well doubted whether in this state it can be regarded as sound law to the extent insisted on. The court state, in the case in 5 Johnson, that no power was given to bind the principal by covenants. If the letter of attorney in that case contained a clause limiting the agent's power, in express terms, and forbidding him to attempt binding the principal by personal covenants, we readily admit that all such covenants inserted in the deed were void, but if the letter of attorney was merely silent on the subject, then we doubt the correctness of the opinion as applicable to similar transactions in this state.

The power executed by Alves, authorizes Hopkins to sell. It says nothing about Hopkins executing conveyances of the

title, or bonds for the title. It gives Hopkins unlimited discretion as to credits. The statute of frauds requires contracts, relating to the sale of land, to be reduced to writing. When Hopkins made a contract of sale, under the power of Alves, to make it obligatory under the statute, it must be reduced to writing either by an executory contract or by deed, passing the title. If the power to sell does not necessarily import a power to convey, or the power to execute a title bond, or other executory contract binding Alves to make a title, then his letter of attorney to Hopkins, although solemnly executed, would have no practical and binding effect. To consider it a nullity would be absurd. How far, then, did it go in vesting Hopkins with power to bind Alves by written contract? We can not give it less effect than to authorize Hopkins in consideration of the sum which the purchaser may promise to pay, to give a title bond in the name of Alves, binding him on the payment of the money to make a sufficient title. What kind of deed or conveyance would such a bond require? The case of *Fleming v. Harrison's devisees*, 2 Bibb, 171 [4 Am. Dec. 691], furnishes the answer. It would be a deed with a general warranty. And there is the strongest reason, founded on moral fitness and justice, for the opinion that a covenant to convey land does not create and vest in the covenantee a legal estate in the land; but it invests him with a legal right to demand such an estate, and unless he can get such an estate he may vacate the contract and recover the purchase money. If, then, he is to accept a deed, by which his covenant is satisfied, it should be such a deed as would, in the event of a paramount title ousting him, give all the right to recover the purchase money, which existed on the covenant before it was satisfied by the acceptance of the deed.

The power of attorney did authorize Hopkins to stipulate for the conveyance of the legal estate. If Alves did not intend to go that far, he was vesting a colorable power in Hopkins, by which to deprive men of their money without responsibility on his part; no one would so understand the power from its general tenor and language. Hopkins, having power to contract for the conveyance of the legal title, had therefore authority to stipulate for a conveyance by deed with general warranty. Such would have been the legal result, without an express stipulation to that effect, had his contract with Vanada and Winpee only covenanted to convey the legal title. The letter of attorney sets up a legal title to the lands which Hop-

kins was authorized to sell, in Alves. They are lands conveyed to him and descended to him. It is this legal title which he authorizes Hopkins to sell, and it is the legal estate he ought to assure by deed with general warranty. Such a construction does him no injury, and we think it warranted by law. The case of *Fugate v. Hansford's executors*, 3 Littell, 262, shows that an instrument expressive of a contract of sale, although it may not stipulate to convey, will justify a court of chancery in decreeing a conveyance. If it were, then, conceded, that Hopkins, under the power, was not authorized to convey, yet as his right to sell is unquestionable, a court of chancery, by bringing Alves or his heirs before it, will compel them to do, by conveying, that which will give effect to sales made by Hopkins. The stipulation in Hopkins' contract to convey with general warranty is not a departure from his power. But even if it were, we are not prepared to admit that the whole contract was vitiated by it and rendered a nullity.

On this point the case of *Dehart, etc. v. Wilson, etc.*,¹ decided by this court at the April term, 1828, is cited. There, a particular authority was given to execute an injunction bond conditioned as required by law. The court decide that the bond actually executed by the agent, differed in the condition of it, substantially from the condition prescribed by law. Imposing on the principle, in the opinion of the court, a liability different from that which he authorized his agent to impose, it was, therefore, not binding; but here a power to sell land is given; no particular form is prescribed for the instruments which the agent may execute as evidence of his sales. If, therefore, in any such instrument, he shows what land he did sell for his principal, and it be the land he was authorized to sell, and then proceeds in the same instrument to bind his principal to do an act not warranted by the power, it seems to us that the principal may well be coerced to perform that part wherein the agent had power to bind him. In such a case, the purchaser or covenantee might well resist a specific execution of the contract, because he could not get all which his contract stipulated he was to have; but when he is willing to accept a part only, and that part which the agent had authority to sell or contract for, we see no ground upon which the principal can object. In such cases, the doctrine of Coke may be safely relied on, that "where a man doth that which he is authorized, and more, it is good for that which is warranted, and void for the rest." If, then, the

stipulation to convey with general warranty exceeded the power, we are of opinion that the only effect it should have ought to be an exoneration from the warranty.

The second question relates to the manner of signing the contract by Hopkins. It is contended by the counsel for the appellees, that it is the contract of Hopkins alone, and that it can not be enforced upon Alves or his heirs. That Hopkins is personally bound by the contract, from the manner of its execution, we will not question. We might concede that an action of covenant upon it, for failing to convey or cause to be conveyed, would entitle the covenantees to recover against Hopkins, as well for the land owned by Alves, as that owned by himself. But it does not thence follow that a suit in chancery may not compel Alves or his heirs to a specific execution. The rule that an attorney, in executing an authority, should do it in the name of the person giving the power, and not in the name of the attorney, is laid down as a correct one by Paley on Agency, 152, and Co. Lit. 258, a, and we have no doubt of its propriety; but we have not been able to find any adjudged case, applicable to an executory contract, forbidding the chancellor to interpose, to aid a defective execution of a power, when the defect consists in the difference between signing the principal's name by his attorney, and signing the attorney's name for the principal. In executed contracts, such as the case of *Harper v. Hampton*, 1 Harris & McKenny, 175,¹ note, and *Frontin v. Small*, 2 Raymond, 1418, courts have held deeds invalid which were executed in the name of the attorney for the principal, regarding such deeds as the acts of the attorney, and not the acts of the principal; but the case of *Harper v. Hampton*, referred to, was not decided by the court of appeals of Maryland, in which it was pending at the date of the note referred to, and how it was finally disposed of we know not. The case of *Onion's lessee v. Hall*, to which the note relative to the case of *Harper v. Hampton* is attached, is an authority in support of the validity of a deed, executed by signing thus: "Roger Matthews, attorney in fact for the said Anna Wriothesley," and which, in its commencement, purports to be a deed between said Anna and Wm. Brown.

The signing in this case bears a strong analogy to the signing by Hopkins for Alves, and it may be remarked that the contract which is sought to be specifically executed, shows upon its face, beyond all doubt, that Hopkins, in styling himself attorney for Alves, did not merely design thereby a description of his own

1. *Harper v. Hampton*, 1 Harris & McKenny's R. 175, note.

person, but that Alves was intended to be affected by it. It is obviously an attempt on the part of Hopkins to execute his power by entering into an executory contract. Whatever adjudications, therefore, may have taken place on trials at law, in regard to executed contracts, where attorneys have not observed the proper form in the execution of their authorities, we do not feel ourselves constrained to apply the rigid rules to be found in some of them, to executory contracts, in a chancery proceeding like the present. It is the chancellor's proper element to decree a specific execution of agreements, to assist defective conveyances, and to aid defective executions of powers. In Sugden on Powers, 344, it is laid down that "at law the omission of any circumstance required to the execution of a power, was deemed fatal; but equity, where there was a good or a valuable consideration, interposed in its aid and supported the defective execution of the power." "A power of attorney is a common law authority:" Sugden on Powers, 1. If the contract between Hopkins, and Vanada, and Winpee was invalid at law, so far as Alves and his heirs are concerned, in chancery it is otherwise. There it ought to be enforced. The statute of frauds does not prohibit our doing it. The terms of the sale are evidenced by writing, signed by the agent for the principal, and we can not perceive any mischief likely to result to society from enforcing a specific execution in such cases.

We are, therefore, of opinion, that the circuit court erred in refusing relief to the complainants, now plaintiffs in error; they were entitled to a specific execution of the contract of their ancestor, conformably with this opinion. Had it been proper to dismiss the bill, as to the heirs of Alves, the court ought not to have dismissed it as to Hopkins' administrator and heirs. If the plaintiffs in error could not get the land from Alves' heirs under the prayer for general relief, a decree should have gone against the representative of Hopkins. But it is not necessary to state more on this point, as we are of opinion the plaintiffs in error were entitled to a conveyance from Alves' heirs, for the interest of their ancestor in their land described in contract sought to be enforced.

The decree of the circuit court is reversed, and the cause remanded, with instructions to render a decree not inconsistent with this opinion.

The appellants must recover their costs.

CRAIG v. DURRETT.

[1 J. J. MARSHALL, 366.]

JURY MAY FROM THEIR KNOWLEDGE of the business of society and the value of the labor, in assumpsit for work and labor, find a verdict for the price of the work done notwithstanding there is no evidence of the worth of labor at the time and place the work was performed.

ASSUMPSIT. Error to the Mason circuit. The opinion states the case.

Depew and Sanders, for plaintiffs.

Crittenden, contra.

By Court, UNDERWOOD, J. Durrett recovered a judgment against Craig, for forty dollars, in an action of assumpsit, for work and labor in making bale rope. Craig moved for a new trial, which was refused by the court; an exception was filed, and the case brought up for revision. There is but one question presented, Is the verdict and judgment contrary to law, or the evidence? A new trial was moved for, solely on the ground that the verdict was against law and evidence. If, therefore, the record does not show it was contrary to law or the evidence, we can not say that the court erred in refusing a new trial. There is nothing to show that the verdict is against law, and the only plausible ground on which to maintain that it is against evidence, is that the proof as certified, does not state the price for making the bale rope. We do not reverse the judgment on that account. The quantity manufactured, and the place where it was done, were proved. The jurors were from the vicinage, and we must take it that they had some knowledge of the value of labor, and the time required to make bale rope. With this knowledge, they had a right, from the facts proved, to assess the damages. If in assumpsit for work and labor done, the nature of the work is described, and the number of days the hands are employed is given, or the quantity of work done is proved, although no witness should state the price of laborers by the day, month, or year; we think the jury might rightfully assess the damages, and we would not reverse unless it appeared they had found too much.

This court has decided that the jury may fix the price of the property sued for, from its description, although the witnesses are silent as to price. Why are these doctrines tolerated? Because courts must act, if governed by reason and common sense, upon the presumption that jurors are acquainted with the ordinary transactions and business of society; and perhaps no one

thing is so well known, as the value and prices of labor. Jurors will be influenced by their own knowledge, in coming to a conclusion; and it is right they should be. And whenever, from the facts proved, it can rationally be inferred that the jury could, from their knowledge of business, come to a correct conclusion as to the extent of damages the party is entitled to, we think courts ought not to control their verdicts for want of evidence. In this case it can not be said that the verdict is contrary to evidence. There is no pretext for saying any more, than that they were not authorized to find, as they did, for want of evidence. We think there was evidence enough before them to support their verdict. This opinion does not conflict with the settled doctrine, that it would be improper for one juror to detail a fact within his knowledge to his fellow-jurors in their room as evidence, which was not stated in open court.

Wherefore, the judgment is affirmed with costs.

LAMPION'S EXECUTORS v. PRESTON'S EXECUTORS.

[J. J. MARSHALL, 454.]

PERSONALTY, PROPERTY IN, HOW CHANGED.—A person who takes the property of another wantonly and without the owner's consent can never acquire a right to it by "accession" or "specification;" but the right to the same may be so acquired, provided the possession of the same is innocently obtained and the species of the property be changed.

"ACCESSION" AND SPECIFICATION explained and defined.

TROVER. Error to the Jefferson circuit. The opinion states the case.

Monroe, for plaintiff.

Denny and Haggin, contra.

By Court, **MILLS, J.** In a controversy about the boundaries of Louisville, between the holders of lots therein, and Preston, the owner of the adjoining lands, the latter recovered of Lampion, one of the owners of the lots, in an ejectment, a lot, whereon Lampion, who was a brick maker, had a brick yard, and when the writ of *habere facias possessionem* was executed, and the possession delivered to Preston, there was in the yard a quantity of bricks burnt, ready for use, and a quantity unburnt, which Preston took with the possession of the ground, and he refused to let Lampion remove them, but converted them to his own use, and after the death of both of the parties,

this action was brought by the executors of Lampton against the executors of Preston, for the value of the bricks so converted; and the only question involved is, to whom do the bricks belong; whether to Lampton, who did not own the soil out of which they were made, but of which he was possessed at the time when he made the bricks, or to Preston, who was the true owner of the soil, but who had no hand in making the bricks. This involves a new question, to be decided by the law which gives a right of property by accession, as it is termed, both in the civil and common law. On this point the rule seems to be, that no one, by any operation upon, or change of the materials of another, can make them his own, except the change is so great as to convert the materials themselves into a different species. Thus, the cloth of another, which, without leave of the owner, is made into a coat or other garment, or his leather into shoes, or timber squared and fitted for use, does not vest in the operator; but all the owner has to do to reclaim his property, in its new shape, is to identify the materials. In like manner silver being made into cups or spoons, being still silver, can be recovered by the original owner. But if his corn be made into meal, his olives into oil, or his grapes into wine, the change is into a new species, and is so great that the original materials can not be reproduced out of the articles, and the new article belongs to the operator, and he is only bound to account to the owner for the value of the original materials: 2 Black. Com. 404; 2 Kent's Com. 293.

By this rule it may be determined to whom these bricks belong. As to the bricks not burnt, there can not be a serious question. They are soil and earth still, and belong to the original owner, and it is evident that no recovery of their value can be had. The only difficulty that can arise, is with regard to the bricks that are burnt. They, by the process of fire, have undergone a considerable change; indeed so great as to place them nearly on the boundary line of right between the original owner of the materials and the artist. Still we apprehend that the change is not sufficient to strip the original proprietor of his right. If they had been molded into glass the species would have been changed, and as they could not be reduced back to the earth again, the title of the artist would prevail. But this we know is not the fact. They can be dissolved and be made again into soil, although the process by which it can be done may require both time and labor. It therefore follows that the property is not changed, and they still belong to the proprietor

who has kept them, and the maker of the brick who put the materials into that shape, without the leave of the owner, can not recover.

And as the court below has given the same decision, the judgment must be affirmed with costs.

The counsel for Lampton's executors filed a petition for a rehearing, but before it was decided the members of the then court resigned, and the present judges granted the prayer of the petition.

By Court, ROBERTSON, J., upon a rehearing. The principle which must decide this case, although extensive in its operation, has not been familiar in practice to the courts of this country; nor has it been ascertained with philosophical accuracy, or defined with satisfactory precision, by either the civil or common law. And if it had been ever so perfectly deduced from the most scientific generalization, its application to this case depends on analogies so nice, and facts so subtle, as to render the decision of this controversy as perplexing as it is important. For these reasons we granted a rehearing on a petition to our predecessors, which had not been disposed of by them. The cause has been reargued, and after all the reflection which we have been able to devote to the investigation, we will be compelled to pronounce an opinion entirely differing from that which was rendered. So much of the civil law as applies to this subject was incorporated by Bracton, in his treatise on the laws of England, and its rules and directions blended with those of the common law. They have been recognized ever since as the doctrines of the common law, and therefore were transplanted in the American jurisprudence, with the stock on which they were engrafted.

By exploring the civil and common law, so far as they bear on this case, some confusion will be found in their rules, as well as in the application of them to particular cases. But there are two comprehensive and fundamental rules pervading all the authorities which have been consulted on the doctrine of accession and of specification; from the first of which it is not known that there are any exceptions, and from the last of which it is believed that there can not be many. These rules are: 1. That no trespasser, who takes property of another wantonly and without the owner's consent, can ever acquire the right to it by any "accession" or "specification" whatsoever; 2. Where the property of one comes to the possession of another innocently,

he may acquire the right to it, if by "accession" or "specification" the species be changed. The difficulties of this case result from the various and indefinite characters of the cases which have been excepted from this last rule. It is hence very difficult to ascertain any principle of uniform and universal application on which the rule itself is founded. In some authorities it is said that the proper test of the right of the first owner is the identity of the thing or material; in others, its capacity for being converted into the original species; in others, the non-accession of adventitious value exceeding that of the original material; and in others the retention, by the material, of its specific character, or kind, or qualities. Thus, for example, Justinian says, in lib. 2, tit. 1, page 75, "That if the species or manufactured article can be reduced to its former rude materials, then the owner of such materials is to be reckoned the owner of the species; but if the species can not be so reduced, then he who made it is understood to be the owner of it; for example, a vessel can easily be reduced to the rude mass of brass, silver, or gold, of which it was made; but wine, oil, or flour, can not be converted into grapes, olives, or corn; neither can mulse be separated into wine and honey. But if a man makes any species, partly with his own and partly with the materials of another, as if he should make mulse with his own wine and another's honey, or should make a garment with an intermixture of his own wool with that of another, it is not to be doubted in such cases but that he who made the species is master of it," etc. On page 81, he says, that if an artist paint a picture on the canvas of another, the whole belongs to the painter. "For (says he) it is ridiculous that the painting of an Appelles or a Parrhasius should yield as an accession to a worthless tablet." "Another rule is, that if the materials of one person are united to the materials belonging to another by the labor of the latter, who furnishes the principal materials, the property in the joint product is in the latter, by right of accession:" 2 Kent's Com. 294; see, also, *Merrill v. Johnson*, 7 Johns. 473 [5 Am. Dec. 289]; and in this case, in 7 Johnson, in Pothier (in his *Tracte du Droit de Propriete*), and in Bracton, it is laid down, that if one "builds a vessel from the foundation, with the materials of another, the vessel belongs to the owner of the materials." But if money be made into a cup, "the property is so altered as to change the title:" Bro. tit. Property, 23. It seems to have been an established doctrine of the common law, as early as the year books, that no change of mere form could divest the right

of the owner of the materials, as leather made into shoes, cloth into coats, timber into planks, blocks, or shingles; in all which cases the material is not altered in its qualities or kind, and can be easily identified: 2. Kent's Com. 296; *Burris v. Johnson*, 1 J. J. Marshall, 196, and the authorities there cited. These are some of the doctrines of the books. We shall endeavor to deduce from them something applicable to this case.

As to the first rule, that a willful trespasser can not acquire a title to property by merely changing its species, it is sustained by authority: See Dyer, 127; *Curtis v. Groat*, 6 Johns. 169 [5 Am. Dec. 204], and the above opinion in *Burris v. Johnson*. But this rule has no application to this case. It is not pretended that Lampton was a willful trespasser. The decision, therefore, must depend entirely on the application or some modification of the second rule in relation to the consequences of "accession" or "specification" when there has been no intentional invasion of the property of another. We are inclined to think, from a survey of all the authorities within our reach, that the accession of mere value by the application of labor or skill alone is generally not sufficient to transfer the proprietorship to the operator. There must, in general, be the addition of some other material belonging to the possessor or operator before the product can vest in him. If there be any exception from this rule (and we do not doubt that there may be), it must be in cases in which the accession of value to the raw material is so far beyond the original value as to impress on the reason of mankind the injustice of permitting the *bona fide* producer of that increased value to be deprived of it. Such may be the case of the statuary. A Phidias, a Michael Angelo, a Canova, or a Chantrey might be entitled, by the award of common sense and common justice, and, therefore, of common law, to a marble statue of a Pericles, a Venus de Medicis, a Napoleon, or a Washington, the *chef d'œuvre* of his genius; although the unchiseled block was the property of another, converted innocently by the artist, without the owner's knowledge, into the emblem of human excellence. This would be the decision of the French civilians, who have exploded the ancient and arbitrary doctrine of the Justinian code, that the author, a Horace, or a Dante, or a Milton, for example, of an immortal lyric or epic would not be entitled to the poem if it had been written on paper belonging to another. The reason assigned by Pothier and Toullier for overruling this unreasonable "decision of the Roman law" is, that the paper is of a value so greatly disproportionate to that of the poem that the

author should be entitled to the production by paying for the paper; the composition being considered the principal, and the paper the appendage, or accessory. This reason is too comprehensive. For it is not disputed that if A. make cloth out of the wool of B., or a table or a boat entirely out of the timber of B., though the value of the new species exceeds that of the material more than two-fold, the owner of the material is entitled to the species.

It would seem, therefore, that there must be some qualification of the rule, that no accession of skill or labor merely will change the right, and that the principle which must regulate the restriction is somewhat indeterminate. Every case must depend on its own peculiar circumstances, with only this guide, that the case must be an extreme one, which will authorize an exception from the general rule. When the authorities speak of rights by "accession" they generally mean accession of other materials, as well as skill or labor; as in the case of the cloth manufactured out of the wool of a stranger, and of the manufacturer. Here the fabric would belong to the manufacturer, because the several parcels of wool could not be identified and separated. For, to acquire a title by "accession" of materials, not only must the commixture be *bona fide*, but the materials which belong to another must be incapable of being restored to him in their original form, that is, the material must not possess all its original distinctive qualities; if it does, there has been no specific change in the nature or elements of the thing. And a mere change in the external shape or in the bulk, will be immaterial. Right by "specification" can only be acquired when, without the accession of any other material, that of another person, which has been used by the operator innocently, has been converted by him into something specifically different in the inherent and characteristic qualities which identify it. Such is the conversion of corn into meal, of grapes into wine, etc.

Here, although the meal possesses no quality which the corn did not, yet it not only does not possess all the same qualities, but there is a difference in the name, the character, the solidity, and every attribute which distinguishes one species from another. Meal and corn are as different as lime and rock, or rye and whisky. In such a case, the rule as laid down in the books is indefinite, and in some of the cases cited for illustration, seems to be two-fold: 1. That there must be a change of the species; 2. That the thing changed must be insusceptible of reduction to the original quality and kind. The universal applica-

tion of the latter branch of the rule seems to be irreconcilable with principle. The reason why the material of one which has been changed into a different species by another is not to be restored to the original owner, is that it can not be returned in kind. It is not the specific thing which belonged to him, and therefore is not his, and can not be his (though it may by some chemical or mechanical process be resolved into its original elementary qualities), unless the original material can be restored without any intrinsic change. Therefore, as long as it remains a new and essentially different species it can not be recovered by suit from the person who effected the change in it.

There may, however, be such a modification of a material of one man by the operations of another as to change its name and its specific identity, or individuality, without a mutilation of its original qualities and ingredients, such as the change effected by the conversion of bullion into a cup or spoons, and of timber into plank or shingles. Here the cup is not the bullion, nor are the shingles the trees. The former is, however, still silver, and the latter are still wood. The inherent and distinctive qualities of the material remain the same. In such a case there has been a "specific," but not an essential change. The identity of the thing has been lost, but the essence of the material has undergone no change; for example, the bullion has been converted into a cup, which it would be improper to denominate bullion. But the essential and constituent particles of each are the same, silver, and the identical silver of the mass of bullion. Here the two-fold rule will apply. There has been a change in the species of the thing, but not of the material, and the cup can be reduced to bullion. It retains all the attributes of the lump of silver of which it was made. It was silver, it remains silver, and the same silver it was, without any process of conversion or reduction. But a cup made of coin, although the essence of the material, silver, is unchanged, can never be restored to coin again by any individual operation. It has lost the impress which gave it currency as coin, and this can never be given to it again, except by the sovereign power.

Hence, it results that if the material be so essentially changed as to prevent its renovation by individual agency, the owner has lost his right to it; and that if the elements of the material have not been changed, but the specific thing which they constituted can not be reproduced identically by individual operation, the owner of the material does not own the new species. This is the true and rational doctrine of "specification." Such

seem to us to be the rules and distinctions which result from the elementary principle which is either deduced by reason or evolved by an induction of the facts of all the cases reported, so far as they are based on any fixed principle. Having thus ascertained what we consider the true criterion, we shall proceed to test this case by it. Accordingly, it must be decided that the unburned brick belong to the owner of the clay, on paying for the moulding. For, although in the form of brick they could not, with strict propriety of language, be called clay; and therefore the imbedded clay, out of which they were molded, has undergone some change, yet, as the material is still clay, and may be combined into a common mass, and constitute again a substratum for the soil, possessing all the qualities which it had before it was dug up, the owner of the soil can identify the clay in the artificial form of soft brick, and recover it by law.

But is this the case, according to the same principle, with burnt brick? We think not. Whether the right to the burnt brick be tested by the law, either of "accession" or of "specification," it would seem reasonable and consistent that they belonged to Lampton, who made them. First, as to the right by "accession." We would venture to decide that in such a case the accession of value by labor alone is such as to vest the title to the brick in the manufacturer. A million of well-burnt brick may be worth five thousand dollars. The clay with which they were moulded may not have been worth twenty dollars. If the statue, and the poem, and the painting, should belong to the artist and the author, ought not the brick to belong to the operator? The rule for these cases is arbitrary; it must depend on a sound discretion, exercised on the peculiar circumstances of each individual case. Therefore, a decision in one case can not be conclusive authority for any other case of different circumstances. It is not the excess of the artificial over the natural value, but the degree of such excess, that is the controlling principle in such cases. This degree is not and can not be ascertained with precision, and therefore the decision can not be expected to present an exact conformity to any well-defined principle. All that can be known is, that when the disproportion of the value of the material to that of the product is so great as to impress on the mind the justice of considering the material the accessory and the production of the operator, the substantive species, the thing belongs to the producer of the new species. In looking at a fine painting, we never consider the canvas; nor when we admire a beautiful statue do we

put any estimate on the primitive marble. It is the new creation of the pencil and of the chisel which is the sole object of our contemplations, and the sole ingredient in our estimation of value. We look upon and value the one as a fine picture, not as canvas; the other as a noble statue, not a rude, unmeaning block of marble. Hence, the production of the artist is the principal, the material is only the incident.

We feel authorized to deduce the same decision from the facts in this case, in relation to the burnt brick. And another important reason applies in some degree to all these cases; that is, that the production of the artist or operator should belong to him, "*propter excellentiam artis*." Besides, there is in this case not only an accession of value by labor, but there is also an accession of other things to the clay, sand, water, and the effects of fire by the combustion of wood. And on this ground alone an analogy to the mulse made of the wine of A. and the honey of B. we would feel inclined to think that the brick should belong to him who made them. But the law of "specification" applies more directly to this case. In this view it was decided by our predecessors. We shall therefore proceed to consider it on this ground. We are of the opinion that burnt brick are not clay. It seems to us not only that the process of burning effected an essential change in the qualities of the native clay, and therefore that the maker is entitled to the brick; but if there has been no radical change in the material, there has been such an one as to prevent a resolution of the brick into clay, or into the same kind of clay as that with which they were made; and that therefore the bricks belong to the maker. On both grounds, or on either, if both or either be maintainable, the plaintiffs must succeed.

A well-burnt brick has very few of the qualities of the unwrought clay. It has not its consistency, its ductility, its compressibility, its tenacity; it can be applied to none of the uses to which clay is adapted. The moisture and everything else evaporable, has escaped, and does not exist in the brick. Why then should the brick be considered or denominated clay? Limestone is not lime, nor is it the elementary material of which lime is compounded. In the laboratory of nature, these elements have all undergone an essential change in the process of petrification. Is this change essentially greater than that of clay into burnt brick? The rock, by calcination, may be reduced to lime; so the brick may be pulverized; but the lime is not the identical material which constituted the rock. Nor is

the brick dust the same material which constituted the clay. Nor can it be reduced to the same kind of clay, if, indeed, which we do not admit, it can be reduced to clay by any analysis, or combination, without the accession of other materials, which belonged to the clay in its native state, but which were volatilized before it could make brick. Lime is the basis of limestone; alumine is the basis of clay. The clay for bricks is a compound, principally, of alumine and silex. It possesses other ingredients. But when the brick are burnt, they are no more alumine, nor silex, nor clay, than the rock is lime, either mixed or unmixed with the other materials which composed the rock, or than bone is the phosphate of lime.

The ancients made a cover for their dead by drawing the fibers of silex into thread, which they wove into an incombustible web. To preserve the ashes of the dead body, unmixed with those of the funeral pile, they inclosed the body in one of these webs. This fabric, called asbestos, was silex alone. But it could not be consolidated into a silicious mass, as that from which it was drawn. Hence, if one should make it out of the material of another, it would belong to the manufacturer; because, although there has been no change, as in the process of burning brick, in the quantities of the silex, yet there has been such a change in the species as to render it impossible to restore the native material. The same reason applies to brick. But another also applies, to wit, that the inherent qualities of the clay have been transmuted by burning. Porcelain is made of silicious and aluminous clay. In strict propriety, could a fine porcelain vase be considered or denominated clay? Is it clay? Can it be resolved into clay by any menstruum of nature or art, without the accession of foreign materials or agents? A Wedgwood would be astounded if he were told that the finest earthenware, elaborated by his skill, from the almost worthless clay of another, would be the property of that other. But this ware, however attenuated, is as much clay as bricks are, and it can as easily be reduced to clay; but it is not clay; nor can it ever again, *per se*, become clay. It therefore belongs to the manufacturer. The diamond is carbon, and nothing but carbon, in a state of purity and high sublimation. But it is not charcoal, though charcoal may produce diamond, by losing all its gross constituents. If diamond could be produced from charcoal, by any process of art, would it belong to the producer, or to the owner of the rude material? After it shall have been made, it is but the same carbon that existed in the

charcoal; but it is in a different state, and is uncompounded. Can it be resolved into charcoal? It would belong to the producer, if it could be manufactured. So the alumine and the silex in the brick, are the same that were in the clay; but they are in a different state and combination, and are not the original clay, with all its combinations and qualities; nor can they be reduced to the same clay. The cambric needle in the hand of the seamstress is made of steel, the steel of iron, and the iron of the native ore. There has been no chemical change of the particles which compose the needle; but they are not the identical particles which constituted the ore, nor can they be resolved into them. Therefore the needle could not be recovered by the owner of the raw material. There would be no end to such illustrations. These are deemed sufficient for showing what we mean, when we state the principle which must govern this case.

Shingles, tables, or boats, etc., made out of the timber of another, contain, so far as they contain anything, the same particles which constituted the timber; the specific qualities of the wood are the same precisely; therefore the material is exactly the same, and the new species must still belong to the owner of the wood, when the accessory value has not been so great, as on the ground, to change the title.

These cases, on each side, may serve to exemplify the principle, so far as it applies to "specification." The necessary result seems to be that the burnt brick, in this case, belong to Lampton. Preston, in a suit for *mesne profits*, might have recovered for the use of the clay. As the bricks were personal, he could not get them by *habere facias*. He could only be entitled to them as chattels, on the ground that he owned the clay. The cases cited from fifth and sixth Johnson do not militate against this opinion, but as far as they go, tend to sustain it. The case of *Betts and Church v. Lee*, 5 Johns. 347 [4 Am. Dec. 368], decides, that shingles belong to the owner of the timber, because, "whatever alteration in form property may have undergone, the original owner may take it, in its new shape, if he can identify the original materials;" that is, the form is immaterial, if the material remain the same; it is the same in the shingle as it was in the tree. There has been no change in the material—the wood; the only change is in the form. This accords with the doctrine which we have recognized. But the same reason does not apply to the brick; the converse is the fact of the case.

The case of *Curtis v. Groat*, 6 Johns. 169 [5 Am. Dec. 204], decides, that a trespasser, who knowingly cuts the timber of another, without his consent, and converts it into coal, is not entitled to the coal, because he is a trespasser. This is all that is decided. It is true that the opinion intimates (what it was not necessary to say), that the timber could not be identified in the coal, and therefore if there had been no trespass, the owner of the timber would be entitled to the coal. This would not be our opinion. But we do not suppose, if this intimation were ever so authoritative, that it would influence the decision of this case. We know that a German chemist (Bergman) claims the merit of having discovered by various experiments, near Upsal, that burnt brick, by being made wet, and exposed to the sun and elements for several years, may be dissolved. This discovery is not wonderful. No combination of matter is indestructible. Bricks are not, more than other material substances, immortal. Certain solvents may decompose them. But how are they reduced to clay? And what sort of clay? These questions have been anticipated, and the experience and observation of all men will furnish an answer consistent with this opinion. The animal, mineral, and vegetable kingdoms are all nothing but a combination of certain particles, which exist in an elementary state and unorganized form. They may all be decomposed, and reduced to their elements; so of the brick. Sugar is but the saccharine matter of the cane, reduced to a separate and concrete state; it may be dissolved into a sweet juice. But it does not therefore belong to the owner of the cane.

Bricks are very enduring, when well burnt by fire. It is said by some oriental tourist that even now there remain at the supposed site of ancient Babylon, brick apparently in a perfect state, of which that city was built. Time has not reduced them to clay, and it never will, without the co-operation of other agents, and the accession of other materials, any more than the sugar of the maple can be resolved into "sugar water" without the access of foreign agents.

The only thing like an authority directly on the subject of the proprietorship of brick made by one man with the clay of another, of which we have heard, or which we have seen, is an expression in the opinion in the case of *Port v. Tuston*, 2 Wils. 172.¹ In deciding, in relation to another matter, the court says: "The case of a brickmaker is very different; the earth is manu-

1. *Port v. Tuston*, 2 Wilson, 172.

factured and turned into quite a different thing." Of course, it was the opinion of that court that the brick belonged to the maker. This, we acknowledge, is not positive authority, but is persuasive argument, and being the only allusion which has been found in any book to the question we are considering, is strongly confirmatory of the reasons which we have offered in support of this opinion.

Judgment reversed, and cause remanded for a judgment to be entered on the agreed case in favor of plaintiffs.

PERSONAL PROPERTY, alteration in form of, right of owner to reclaim. In New York the law is settled, that whatever alteration in form property may undergo, the original owner may take it in its new shape, if he can identify the original materials, and this is adopted as the law in other states: *Betts v. Lee*, 4 Am. Dec. 369, note; *Curtis v. Groat*, 5 Id. 204, 205, note.

HUNT v. BOYIER.

[1 J. J. MARSHALL, 484.]

COURT OF EQUITY CAN NOT SET ASIDE a common law judgment by decreeing a new trial peremptorily; but upon it being determined that a new trial is proper, the way to enforce its decree is by operating upon the person of the defendant by attachment, sequestration, and the like.

JUDGMENT AT LAW HAVING BEEN SATISFIED, equity has no power to compel the amount paid to be refunded. A judgment remaining unreversed or unaffected by a new trial, secures to the creditor the money collected thereon, and he can not be compelled to refund the same, unless obtained fraudulently.

EQUITY MAY DIRECT A NEW TRIAL in an action at law, where the common law judge would, but sufficient reason must be alleged and proved why the application is not made to the latter, and absence on private business is not sufficient.

BILL in chancery. Error to the Whitley circuit. The facts appear from the opinion.

Caperton, for plaintiff.

E. Smith, *contra*.

By Court, ROBERTSON, J. This was a bill in chancery, filed by Hunt against Boyier, for a new trial of an action of trover, in which the latter had recovered a judgment for forty-five dollars and costs against the former. Two questions are presented by the record: 1. Had the court the power to render the decree which it did? 2. Did the facts justify any decree for the complainant below?

The court, by an interlocutory order, directed to be served

on Boyier, required him to submit to a new trial. On his refusal to consent to a new trial, the court made a final decree, adjudging to Hunt against Boyier the amount of the judgment at law; that judgment having been satisfied by judgment. We can not concede to the court the authority to render such a decree. The chancellor can not set aside a common law judgment by decreeing a new trial peremptorily. When he determines that a new trial is proper, he can enforce his decree only by operating on the person of the defendant by attachment, sequestration, fine, or imprisonment; or by injunction, if the judgment shall not have been satisfied: *Litt. Sel. Cas.* 451. Nor can he, if the judgment at law shall have been paid off, decree that the amount be refunded. As long as the judgment shall stand unreversed and unaffected by a new trial, it secures to the creditor the money which he may have collected under it. The chancellor can not reverse or nullify that judgment; nor compel the creditor to surrender what he may have acquired by it, unless it had been obtained fraudulently. The chancellor, in this case, has exercised the powers which belong alone to a jury and a judge of law. He has not only adjudicated on the evidence, and decided that the verdict and judgment obtained by Boyier are erroneous, but has decided that he shall refund the amount which they enabled him to collect. The controversy is perfectly legal, and can be retried only in a law forum. Hunt can have no right to restitution while the judgment shall remain in full force; and whenever, by a new trial, he shall have such right, his remedy for it will be legal. Chancery can not entertain jurisdiction of a claim to a reimbursement of the amount paid on the judgment, on the ground that the complainant was not ready for trial. The decree of the chancellor is, therefore, erroneous, and must be reversed on this ground.

But there is error in the second point, more extensive in its effect, and more fatal to the claim of Hunt to relief, than that which has been noticed. The allegations and proof did not authorize a decree for a new trial. Boyier had loaned to Hunt a horse to ride to Lexington. The horse died on the way, and Boyier insisted that the death was the effect of the negligence and excessive hard riding of Hunt, sued him for the horse in trover, and recovered forty-five dollars. Execution on the judgment was replevied for two years, and the replevin bond satisfied after it became due. Hunt afterwards filed his bill for a new trial, relying on the allegation that he was in the south with stock at the time of the trial, and had discovered since his re-

turn home, that he could prove that when he borrowed the horse he was unsound. Several depositions were taken, which leave room for reasonable doubt whether the horse was unsound or not. But there is no proof that he died of any such unsoundness, or that it was at all probable that he would not have died if he were perfectly sound at the loan. It was proved that an agent and a lawyer defended the suit at law for Hunt; that under the general issue an attempt was made to prove the unsoundness of the horse. It also appears that Laughlin, who rode with Hunt to Lexington, was a witness on the trial before the jury.

On these facts several objections to the decree obviously appear.

1. The allegations of the bill are insufficient. The excuse for not making full proof on the trial is very defectively and indefinitely set out, and would not be good if it had been stated with ever so much precision. It is not alleged when the discovery was made of the new testimony, except that it was after the judgment. Was it after or before the payment of the money? If before, why was not the bill filed sooner? If after, why was it not discovered sooner? If the discovery was not made until after the payment of the replevin bond, the inference would be, that Hunt had not been vigilant; unless he had satisfactorily explained how he made the discovery and why he did not make it sooner. Either branch of the dilemma is fatal to Hunt's equity. If he made the discovery shortly after his return from the south he ought to have filed his bill sooner than he did. If he did not make the discovery until after the satisfaction of the judgment, he has evinced a passiveness which must be fatal to his claim to equitable assistance. "*Vigilantibus non dorminetibus, servat lex*," applies more emphatically to motions or bills for new trials than to any other class of cases. It does not appear that there were no other witnesses except those said to be discovered after the trial, nor that any pains had been taken to find witnesses, nor that Hunt did not know of the unsoundness before the trial. These allegations would all be necessary.

But there are still other and stronger objections.

2. The alleged discovery is not of a new matter of defense, but of additional evidence in support of a fact put in issue and tried by the jury. For such a cause a new trial ought not to have been granted by the judge who tried the case. There would be no end to trials nor any certainty in their results, if new trials should be granted on the allegation of a discovery of new witnesses to prove a fact in the knowledge of the party

and in issue on the former trial. Such a practice would subserve purposes of fraud, and encourage by indemnity every species of carelessness and inattention in the preparation of of suits. Hence it is not tolerated. On this point the bill is radically defective.

3. The excuse for not being prepared fully on the trial is unsatisfactory. Absence on private business has never been held sufficient of itself to authorize a new trial. If a litigant shall deem it more profitable to embark in an adventure of speculation or to devote his attention to other private concerns, than to attend to the preparation and trial of his suit, he must submit to the consequences of his voluntary election. Those who engage in the exportation of the stock and of the surplus products of our state, deserve all the favor which any other class of citizens receive or have a right to expect. But neither the principles of law, nor of justice, nor of public policy, could permit it to be established as a general rule, that absence from the court on private business to the south or elsewhere, should entitle the absentee to a new trial in any case which may have been tried in his absence.

Besides, in this case, Hunt left agents at home to attend to his suit; if he did not, he ought to have done it; and it was his duty to give them instructions and information of all the facts in his own knowledge which might have become material to his defense. Nothing of this kind appears in the bill. Even if the excuse for absence were sufficient, it should appear that his presence would have made a material difference in the result: 1 Marsh. 351. The chancellor may direct a new trial at law (whenever a case is presented in which the common law judge would grant it), provided satisfactory reasons are shown for failing to make the application at law.

But in this case, if the application had been made to the judge in proper time, he could not, consistently with established principles, have granted a new trial; *a fortiori*, the chancellor should forbear; and the excuse for not being ready on the trial and for not then moving for a new trial is entirely insufficient; and if it were not, the other objections are insuperable.

Wherefore, the decree is reversed and the cause remanded with instructions to dismiss the bill.

CONTROL OF EQUITY over judgments at law is considered in the note to *Hord v. Walker*, 15 Am. Dec. 69, and the authorities found in this series on that subject are there collected and referred to.

LEWIS v. HOOVER.

[1 J. J. MARSHALL, 500.]

DETINUE LIES TO RECOVER A NOTE evidencing a debt to which plaintiff has a right of property and the immediate right of possession, no matter how defendant obtained possession thereof.

DETINUE. Appeal from the Jessamine circuit. The facts appear from the opinion.

Haggin and Loughborough, for appellant.

By Court, ROBERTSON, J. This is an action of detinue by Hoover against Lewis for a promissory note for five hundred dollars in commonwealth's papers. It appears, from the testimony embodied in a bill of exceptions, that Hoover held a note on Lewis for five hundred dollars, payable in notes of the bank of the commonwealth; that Lewis had proposed to execute another note for five hundred and twenty-five dollars in the same kind of paper, in lieu of the five hundred dollar note, with certain gentlemen as his securities, which Hoover agreed to accept whenever it should be delivered to him with all the signatures; that Lewis signed the note for five hundred and twenty-five dollars and left it with Hoover, taking the note for five hundred dollars with him, on a promise to procure the signatures of the securities to the other note. It was agreed that if he did not cause the note for five hundred and twenty-five dollars to be fully executed within a specified time, he should return the note for five hundred dollars. He failed to complete the execution of the note for five hundred and twenty-five dollars, and then refused to surrender the other. Whereupon this suit was instituted to recover it. The jury, on the general issue, found a verdict for Hoover. Lewis made a motion for a new trial on an affidavit, which the court having overruled, judgment was rendered on the verdict for Hoover.

It is insisted here that the action was not maintainable, and that if it were, the court ought to have awarded a new trial, for the reason stated in the affidavit. There can be no doubt that an action of detinue will lie for a deed, note, or any other muniment of title or document of debt. Has the plaintiff property in the thing? Has he a right to the immediate possession of it? Can it be identified? Is it in the possession of the defendant? These are the only inquiries which it is necessary to answer affirmatively to entitle the plaintiff to maintain a suit in detinue. If all these facts concur, the plaintiff must succeed.

They are all abundantly proved in this case. But it is suggested by the counsel for Lewis that the action is misconceived. He insists that as Lewis obtained the possession of the note, with the assent of Hoover, and promised to return it on a certain contingency, the only remedy for a breach of this contract is *assumpsit*. There is no solidity in this argument. It is immaterial how Lewis obtained the possession, or for what purpose. If Hoover has a right to the note, and Lewis has no right, *detinue* may be sustained, and is the appropriate remedy for the restitution of the note. "It lies upon a contract for not delivering a specific chattel, in pursuance of a bailment or other contract:" 1 Chitty, 118.

A bailor may maintain *detinue* or *trover* against his bailee of a chattel, after the contract of bailment shall have been fulfilled. He may, surely, if he chooses, bring *assumpsit* for a breach of contract. But there can be no doubt that he can recover the specific thing bailed; and this he can do in *detinue* only. It can not be doubted, that if A. pledged a slave with B., as a collateral security, for money to be refunded on a given day, he may recover the slave in *detinue*, by paying or tendering the money on the day. He may also bring *assumpsit* or *trover*. In *detinue*, it is supposed that the defendant had acquired the possession legally, by contract or otherwise. Besides, Hoover had a right to treat the contract as a nullity. He had the option either to affirm it by suing for a breach of it, by Lewis, or disaffirm it by demanding his note. If money be paid on a special executory contract as soon as the contract shall be at an end, either by its own terms or by the acts of the parties, or either of them, *indebitatus assumpsit* may be maintained for money had and received: Comyn on Contracts, 76, 77, 81, 82. In such a case, if property be advanced, instead of money, *detinue* may be brought for it. If A. purchase from B. a horse, to be delivered on a particular day, he may recover it in *detinue*, by paying or tendering the money according to his contract: Noy's Maxims, 88; Shep. Touch. 224. In such case, *assumpsit* will lie. But the plaintiff has his election to sue on the contract for damages, or to demand the specific thing which belongs to him.

We are not inclined to multiply illustrations. We would not have considered it proper to admit that the question is open for argument, if it had not enlisted the zeal of counsel, in this as well as in the inferior court. There can be no doubt that Hoover had a right to his action, and that it is well sustained

by proof. The affidavit discloses no good reason for a new trial. It does not state the names of the witnesses; that they had been summoned; or that, if Lewis had been in court, he could have made proof, or shown sufficient ground for a continuance. These defects are fatal, but there are others equally so. The court, therefore, decided correctly on the motion for a new trial.

Wherefore the judgment is affirmed.

REED v. RICE.

[2 J. J. MARSHALL, 44.]

ARTICLE IV. OF THE AMENDMENTS to the constitution of the United States has no application to proceedings under the authority of a state.

SEARCH WARRANT, ISSUED UNDER THE PROVISIONS of the Kentucky constitution, which provides "that no warrant to search any place or to seize any person or things, shall issue, without describing them as nearly as may be," must describe the place to be searched, the person against whom the warrant issues, and the property sought, with such certainty as to be able to identify the same.

IN TRESPASS, THE DEFENDANT MAY SHOW as a justification that he acted under the command of an officer in the execution of process, although the process may not be regular and valid; but if he acted officiously, he must show a valid process.

TRESPASS *quare clausum fregit*. Error to the Montgomery circuit. The facts appear from the opinion.

Haggin and Loughborough, for plaintiffs.

T. T. Crittenden, contra.

By Court, UNDERWOOD, J. Rice instituted an action of trespass, *quare clausum fregit*, against Reed and others, and gave in evidence that they came to the place of his residence and seized and carried away sundry slaves there found.

The defendants justified on the following grounds, viz.: Berry, administrator of Hamilton, obtained a search warrant, directed to the sheriff or any constable of Bath county, requiring the officer to search for and take the slaves alleged to have been stolen, if to be found in the possession of Rice, and to bring him and them before the justice who issued the warrant, or some other. The warrant was placed in Reed's hands, he being a constable. He summoned the other defendants, Berry excepted, to go with him to execute the warrant. Reed, Berry, and the other defendants went to the residence of Rice, and seized the slaves and took them, but did not take Rice. The

defendants insist that they did no more than was their duty for the purpose of executing the warrant.

These facts were set forth in appropriate pleas. Rice admitted the warrant in his replications, and denied the residue of the justification relied on. Issue was also made upon the plea of not guilty. Upon the trial, the warrant was read, and evidence given on the part of the defendants conducing to show that Reed, as constable, summoned the defendants, except Berry, to assist him, and that he and they, with Berry, went to the residence of Rice, there found the slaves mentioned in the warrant, took them and carried them before a justice of the peace. The wife and sister of Rice seized some of the negroes, who were taken from them; they screamed, and the scene was one of some confusion. It lasted not more than an hour. The evidence being closed on both sides, the court, on the application of the plaintiff's counsel, instructed the jury that the search warrant was illegal and afforded no defense to the defendants. Whether the court was right, constitutes the main question in the record for our decision. The warrant issued upon information given on oath by the defendant Berry, that the slaves, consisting of a woman and four children, had been stolen and carried away from the residence of his intestate, and that he believed they were, at the date of the warrant, in the possession of Rice. The slaves were described by names and age in the warrant, with the exception of an infant child. The mandatory part of the warrant was in these words: "These are, therefore, in the name of the commonwealth, to command you to search for and take the said described slaves, if they be found in said John M. Rice's possession, and bring him, the said Rice, together with the said slaves, before me," etc.

It is contended that the warrant is void, because it does not describe the place to be searched. The fourth article of the amendments to the constitution of the United States is relied on to show that the place to be searched ought to be described. We are of opinion that the article referred to has no application in this case, and that it can not affect proceedings under the authority of the states. It was not adopted as an amendment to the constitution of the United States, with the intent to restrict the powers of the states, but to limit the power of the United States, and to prescribe fixed rules relative to searches and seizures, under the authority of the national government. The legality of the warrant in the present case must be tested

exclusively by the constitution and laws of this state. The ninth section of the tenth article of the constitution of Kentucky does not require a description of the place to be searched, in the same language or so explicitly as is required by the constitution of the United States, yet we believe that the place to be searched is required to be described by the constitution of Kentucky. The language is, "That no warrant to search any place or to seize any person or things, shall issue, without describing them, as nearly as may be."

The place, the person, and the things should all be described. The form of the warrant, as given in the Kentucky Justice, page 200, which we approve, and the preceding doctrines, pages 198 and 199, collected from Hale's Pleas of the Crown, and East's Crown Law, show that the place should be described. The proceedings upon search warrants should be strictly legal, for there is not a description of process known to the law, the execution of which is more distressing to the citizen. Perhaps there is none which excites such intense feeling in consequence of its humiliating and degrading effects. The warrant in this case does not describe the place to be searched. It refers to the property as in the possession of Rice. We can not perceive from that what places the officer was authorized to search, or what places he might not search. His authority could not be limited to any one place; and if it be an authority at all, it must amount to authority for searching all places in which Rice might have the slaves kept in his possession. This is too general to meet our ideas of the law, and therefore we are of opinion that the warrant, upon its face, is defective and illegal. But here another question arises. Admitting the warrant to be illegal, were the individuals summoned by the officer, to assist in its execution, bound to take notice of its illegality, and to refuse giving their aid; or were they justifiable in obeying his commands without inquiring whether his authority was legal or illegal? The right and power of an officer to summon the citizen to aid in the execution of precepts to him directed is highly necessary, if not indispensable, to the well-being of society. If all those summoned had to examine and judge of the legality of the process, and then act upon their own responsibility, this necessary power in the officer would in practice be paralyzed in a great degree. It is laid down in Bacon's Abridgment, title Trespass, 610, that "every person who has assisted in the execution of a writ of *fieri facias* must, if he justify in an action of trespass, under the writ,

unless he acted by the command or at the request of the sheriff or his officer, show the judgment upon which it issued; because the writ was a sufficient justification to every one of these, although the judgment was not regular."

It requires but a trivial extension of this doctrine to exonerate those from action of trespass who act in good faith, when commanded or requested by an officer, in assisting to execute process which may not be regular. There is something which instantly strikes the moral sense as being wrong when told that a citizen is regarded as a trespasser for conscientiously aiding to execute the law, as he conscientiously believed at the time. If officiously he undertakes to do it, then he puts his conduct upon his own judgment; and if that deceives, he is responsible; but if he acts under the command of another, and that other, in cases of the kind, may have lawful authority to command him, then we think he ought not to be responsible. In such cases the citizen obeying the officer should be looked upon in the light of a servant, acting by compulsion, and the party injured should seek redress against the officer and those who act "officiously." Under this view we think the instruction of the court was calculated to mislead the jury in respect to the defendants, who had been summoned by the officer, and ought not to have been given in respect to them; but as it relates to Berry and Reed we see nothing objectionable in it. The deed from Fletcher was not evidence, unless it had been connected with title, derived from the commonwealth. Had the title been traced and shown, it would have been competent to use the deed for the purpose of showing that the defendant in error had not possession of the *locus in quo*. Showing a complete title in Jesse Rice, and his residence on the land, might show that John M. Rice was not possessed, and thereby his action of trespass, *quare clausum fregit*, might be defeated.

For the error in the instruction, the judgment of the circuit court is reversed, and the cause remanded for a new trial, not inconsistent with his opinion. The plaintiffs must recover their costs.

SEARCH WARRANTS, what to contain: *Sandford v. Nichols* 7, Am. Dec. 151, *Grunon v. Raymond*, 6 Id. 200; *Bell v. Clapp*, Id. 339.

MARSHALL v. TENANT.

[2 J. J. MARSHALL, 155.]

SPECIFIC LIEN HAVING BEEN IMPOSED on certain particular property, by mortgage or otherwise, by a debtor to secure the payment of a specific debt, equity will not permit such debtor to be harassed by his creditor's creditor until such property has been disposed of, and a deficiency shown.

BILL, THOUGH CONFESSED, yet, if its allegations are destitute of precision, no decree can be correctly rendered thereon.

BILL in chancery. Error to the Jefferson circuit. The opinion states the facts.

Denny, Crittenden, and Mills, for plaintiff.

Nicholas, for defendant.

By Court, **UNDERWOOD, J.** Upon a re-examination of this case, under the suggestions of counsel, we have thought it unnecessary, if not premature, to settle the extent of Marshall's liability at this time. We have, therefore, determined to set aside the opinion heretofore delivered, and to reverse the decree of the circuit court, for the error committed in rendering a decree against Marshall, until the complainant in that court had subjected the property conveyed by Gwathmey to Marshall, and by him transferred to McClanahan and Bogart, so far as it would extend, to the satisfaction of his demands against Marshall. To reach this fund seems to have been the leading inducement in filing the bill. Pope and Bustard, who are called trustees for Gwathmey, are made defendants with that object; but how they were appointed trustees, or what authority they had over the property mentioned in the deed of mortgage from Gwathmey to Marshall, does not appear. There is nothing in the cause which shows the ground upon which the decree in relation to Pope and Bustard is based. If they really be trustees for Gwathmey, and have any concern with the property conveyed by him to Marshall, the court should have compelled them to answer, and exhibit the nature of their trust, and the amount, if anything, in their hands which could and ought to be appropriated in payment of the debts due by Marshall to McClanahan and Bogart. Equity will not allow Tenant, the *quasi* representative of McClanahan and Bogart, to harass Marshall, so long as the fund which he placed in their hands, remains undisposed of. That fund must be first exhausted. It was erroneous to decree an ascertained sum against Marshall, and to give the complainant an execution for it, and then to decree against Pope and Bustard whatever money they then had, or might thereafter get, belonging either to Marshall or McClan-

ahan and Bogart, without ascertaining what sum they then had belonging to Marshall and McClanahan, and Bogart; and how, or from what source it came to the hands of Pope and Bustard. The decree is broad enough to embrace all money had and received by Pope and Bustard to Marshall's use, and to direct the payment of it over to Tenant.

We do not perceive the principle which can justify the court in directing Marshall's debtors to pay over debts due him to the complainant, who is endeavoring to obtain the debts which Marshall owes McClanahan and Bogart only. The decree was drawn up no doubt under the idea that all the money which Pope and Bustard then had, or might receive from Marshall, would arise from the property conveyed to him by Gwathmey, over which they had control. But the language of the decree means much more; so much more as to render it erroneous. It may be inferred that there is something in the hands of Pope and Bustard, or a sum which they may yet receive, that ought to be applied to the payment of the debts due by Marshall. In the absence of the necessary facts in relation to this branch of the cause, it is impossible for us to say what is proper to be done.

The cause has been badly prepared for trial on this branch of it. We shall therefore direct, when the suit is remanded, that the circuit court give the complainant leave to make Gwathmey or his representatives parties to the suit, they being proper parties, and it not appearing to us that Pope and Bustard were his trustees or representatives for any purpose whatever. The bill was taken for confessed against Pope and Bustard; but the allegations of the bill are so destitute of precision in regard to them that no decree could be rendered against them of value to the complainant, or that will do justice to Marshall. We pass by the extent of Marshall's liability, because, in the progress of the new proceedings, which it will be proper to institute in the circuit court, for the purpose of reaching the property conveyed by Gwathmey to Marshall, and subjecting it to the complainant's claims, it may be that the proof which is brought forward by opening the cause, and other charges in the attitude of things as now exhibited, may have such bearing on the merits of the controversy as to make it proper hereafter to render a decree essentially different from that which would now be pronounced. The former opinion rendered at the present term is therefore set aside, and this substituted in its place. The decree of the circuit court is reversed, and the cause remanded for new proceedings not inconsistent with this opinion. The plaintiff in error to recover his costs.

MORTON v. SANDERS' HEIRS.

[2 J. J. MARSHALL, 192.]

POSSESSION, HOW OBTAINED.—A sale of land by *f. fa.* does not, like the execution of a *hab. fa.*, transfer the actual possession. It only gives the right to acquire the debtor's possession, and if the latter or a stranger is in possession when the land is sold under *f. fa.*, neither the sheriff nor court on motion can give the purchaser possession, but he must obtain the same by ejectment.

MOTION for possession. Appeal from the Pendleton circuit. The facts appear from the opinion.

Miles and Brown, for appellants.

Haggin, *contra*.

By Court, ROBERTSON, J. Morton and Ruddle purchased a tract of land, which was sold by the sheriff of Pendleton county under a *feri facias* issued against Sanders' heirs. The circuit court of Pendleton refused to quash the execution and sale on a motion made to it for that purpose by Sanders' heirs. A writ of error being prosecuted to the court of appeals, William T. Barry and Rezin Davidge, claiming the office of judges of the appellate court, took possession of the record, and delivered an opinion reversing that of the circuit judge; and thereupon issued a mandate to the circuit court, ordering it "to quash the execution and set aside the sale." The circuit judge, having entered this mandate on his order-book, quashed the execution and sale, and directed a "*habere facias possessionem*," to issue in favor of Sanders' heirs against Ruddle and Morton for the land which they had purchased under the execution. Pending a motion to set aside this last order, the court ordered a writ of restitution in favor of Sanders' heirs, and then rescinded the order for the "*habere facias*."

It seems that all these proceedings were, in fact, *ex parte*, in the absence and without the knowledge of Morton and Ruddle, and without any other evidence than the certificate of F. P. Blair, of the said opinion, and an affidavit of one Theobald, sworn to in the country before a justice of the peace, and stating that after Morton and Ruddle bought the land at the sheriff's sale they placed tenants on parts of it. A gentleman of the bar, as *amicus*, moved the court to set aside the order for a writ of restitution, for several reasons of both law and fact. On the hearing of this motion it was made to appear, by an affidavit, taken as that of Theobald's was, that Morton and Ruddle had been in the actual occupancy of the land many

years before the sale, under the execution; and that they were in the possession of it, and were residing on parts of it at the date of the sale, claiming it as their own. From which it would appear that they made the purchase at the sheriff's sale to quiet their possession, and did not acquire the possession under the sale. The circuit court refused to set aside its order, and thereupon Ruddle and Morton appealed to this court.

Whether the appeal be considered as calling in question the order, or the refusal to rescind it, or both, it must be sustained; and all the proceedings of the circuit court must be nullified. For, if the court erred in ordering the writ of restitution, it was its duty, when a motion was made to correct the error, to set aside the order. That the order was improper cannot be seriously doubted.

1. The paper purporting to be an opinion of the court of appeals, and in obedience to the supposed authority of which, the order was made, possessed no constitutional efficacy. It was not the opinion of the court of appeals. It was, therefore, in contemplation of law, a nonentity. It had no legal operation. The order of the circuit court was, therefore, without authority. It is true that the circuit judge might have quashed the sale and execution, without any mandate from the appellate court. But this it had refused to do; after which, at a subsequent term, it should not have tolerated a motion to quash, unless it felt itself constrained by the order of the appellate court. There is no doubt that it quashed the execution and sale, and ordered restitution, in reluctant submission to what it erroneously imagined was a supreme authority.

2. If it had been right to quash the execution and set aside the sale, in obedience to the order certified by Blair, still the facts contained in the record did not justify the writ of restitution.

It does not appear that the possession was obtained by the purchaser, under the execution. Waiving the affidavits (which, if admitted as legal evidence, would prove that the possession had been acquired and held long before the sheriff's sale), it is not admitted that restitution, by order of court, on motion, ought to follow a quashal of the sale. It certainly should not, if the possession had not been derived from the execution, or if whether it was or not be doubtful, and the subject of controversy. Whenever the facts necessary to authorize restitution are not apparent on the record, or not admitted to be true, there should [not] be a summary restitution, by order, on motion. The parties should have an opportunity to try the facts in a

regular proceeding and have them proved and ascertained on a full hearing, in the ordinary course of litigation: *Logan v. McNitt*, 3 Bibb, 530,¹ and *McCord v. McLintock*, 5 Litt. 304.² In this case it is not shown that the sheriff's sale gave the purchaser possession of the land; but it is presumable that it did not. A sale of land by *feri facias* does not, like the execution of a *habere facias*, transfer the actual possession. It only gives the right to acquire the possession to which the debtor was entitled. If the debtor were at the date of the sale in the occupancy of the land, the sheriff could not turn him out and put the purchaser in. The purchaser could obtain the possession by an ejectment; neither the sheriff nor the circuit court, on motion, could rightfully deliver to him the possession. "*A fortiori*," a stranger in possession, could not be evicted by the sheriff or by the summary order of the court, without a trial in court by jury.

It is not proved in this case that Sanders' heirs were ever in the possession of the land. For aught that appears, therefore, they lost no possession by the sale. Why then shall the court, without ascertaining the facts, and without giving Ruddle and Morton an opportunity to be heard, turn them out "*volens*," and force the land into the possession of those who have not shown that they ever had any possession? To what are they to be restored? There can be no restitution to an individual of that which he never had, and of course never lost.

If the procedure in this case be tolerated, a new device will be established for getting land by process of law, without suit and without right. If Morgan and Ruddle had occupied the land so long, or under such titles as to prevent Sanders' heirs from recovering it by ejectment, a better expedient could not have been devised for giving the possession to the heirs, than to levy an execution erroneously on the land, as theirs, let the occupants, to quiet their title, buy for a trifle, then quash the execution and sale, and procure a writ of "restitution," by motion without their knowledge. It may not be improper here to observe that it was irregular to receive and act on the affidavit of Theobald. It was not only *ex parte* and extrajudicial, but neither the adversary nor the court saw the affiant, or heard him, or had the privilege to interrogate him. It is strange that a court would pronounce any judgment on such a statement.

The order for restitution must be reversed and set aside, and the case remanded that the court may make an order consistent with this opinion. The appellants must recover their costs.

1. *Logan v. McNitt*, 3 Bibb, 530.

2. *McCord's Heirs v. McLintock*, 5 Litt. 305

FEEMSTER v. MARKHAM.

[2 J. J. MARSHALL, 303.]

MONEY VOLUNTARILY PAID THROUGH MISTAKE, to a person not having authority to receive it, may be recovered back.

ASSUMPSIT. Error to the Bourbon circuit. The opinion states the case.

Feemster, for the plaintiffs.

Hanson, *contra*.

By Court, UNDERWOOD, J. William Richards recovered a judgment against the administrator of John Porter, deceased; and being unable to make the amount by execution, he filed his bill against the heirs and devisees of Porter to reach certain property descended, or conveyed, or devised to them.

Richards departed this life in the state of Virginia, leaving a will duly proved and recorded in that state, by the codicil to which, dated twenty-fifth of March, 1816, Thomas Humphries and John W. Green were appointed executors. Green refused the executorship; and Humphries qualified in May, 1817. In November, 1820, William Markham, by an order of the Bourbon county court, was appointed curator to collect and preserve the estate of Richards, "until the executor of the said Richards shall appear to attend thereto." The order states, as a reason for appointing a curator, "that it appeared that there was in this state some of the estate of William Richards, which ought to be attended to."

On the twenty-eighth of November, 1820, by an order of the circuit court the suit was directed to abate by the complainant's death; and in the same order it was directed to be revived in the name of William Markham, without stating any reason for so doing, or suggesting that he was curator. In November, 1824, another order of the court was made abating the suit as to Richards on account of his death; and directing the same to be revived in the name of William L. Richards, administrator *de bonis non*, of said William Richards. In November, 1825, the present plaintiff in error filed a demurrer to the order of revivor in the name of Markham, and, upon argument of the demurrer, the court pronounced the law to be for the defendants, and ordered the suit to abate.

At the May term, 1826, the court amended the order of the preceding November term, and directed an abatement of the suit in the name of Markham. Before the court had ordered

an abatement of the suit in Markham's name, as aforesaid, to wit, on the eighteenth January, 1823, Robert Trimble, as guardian for Lucretia (who since intermarried with Feemster), John, and Austin Porter, who were infant defendants to the bill, and a part of the children of John Porter, deceased, paid to Markham three hundred and eighty-two dollars and eighty cents on account of the judgment which William Richards had obtained in his life-time against John Porter's administrator. In April, 1826, Feemster and wife, John Porter, and Austin Porter, instituted an action of assumpsit against Markham, to recover from him the money thus paid by Trimble. The court, after the plaintiffs had closed their evidence, instructed the jury to find as in case of a nonsuit, and the jury found accordingly, and the court rendered judgment for the defendant, to reverse which the plaintiffs prosecute their writ of error. The foregoing facts appeared in proof. They were substantially set out in one count of the declaration. The declaration also contained other counts which charge an undertaking on the part of the defendant to pay upon request, for and in consideration of money advanced to him by the plaintiffs. These counts, although not very formal, nevertheless contain a good cause of action. We are of opinion that there was not such a variance between the *allegata et probata*, as authorized the court to instruct as in case of nonsuit.

The only question of importance, therefore, which is presented for consideration arises upon the facts detailed. Do they, in law, create an assumpsit on the part of Markham to pay the plaintiffs the amount received by him from Trimble? If they do, the instruction ought not to have been given. The solution of the question turns, in our opinion, upon the authority which Markham possessed to receive the money. If, at the time it was paid to him, he was legally authorized to receive it, in discharge of so much of the judgment in favor of Richards against Porter's administrator, then he can not be coerced to return it to the plaintiffs. He is accountable for it to those who are entitled to that judgment, and to them only. The judgment was the best of considerations to justify the reception of the money; and as the payment of the judgment by Trimble would and ought to induce a relaxation of all legal means to coerce payment from the administrator, heirs, and devisees of Porter, it might, and probably would, produce injury to compel a return of the money in most cases similarly situated, and to start proceedings anew against Porter's representatives.

Such a consequence, in the equitable action of *assumpsit*, could not be tolerated, where the party receiving the money was entitled to it, and when the jury was to fall on him. But if the money has been paid by Trimble, and received by Markham, under a mutual mistake, then it should be restored; and the law will afford a remedy to effect that which, if not done, would constitute so palpable an injury to the plaintiffs as the loss of more than three hundred dollars, without the semblance of benefit, superinduced by the error of their guardian. It is true that if Trimble has paid away the money of his wards, without being required to do so, he is responsible to them for thus acting; and they might compel him to account for any misapplication of their funds. But where it is perfectly obvious that the payment made by Trimble to Markham was in the capacity of agent, by the guardian, for and in behalf of his wards, we perceive nothing erroneous in permitting them to proceed upon the act of the guardian as their act. Yielding to them an option to go against either instead of one is a doctrine which can not be prejudicial to wards.

Regarding the money paid to Markham as the money of the plaintiffs, and considering the institution of their suit against him as evidence of an election, to sanction the act of Trimble in paying the money, and to look to Markham for the return of it, we shall inquire whether Markham had any right to receive it. His right, if he had any, depends upon the order appointing him curator, and the order reviving the suit in his name. It does not rest on any decree in his favor, for no such decree was ever pronounced; although, from the evidence, it may be inferred that Trimble, in paying the money, acted under the impression that there was such a decree. County courts have authority to appoint curators "during any contest about a will, or in the absence of executors, or whenever the court, from any other cause, shall judge it convenient:" 1 Dig. 526. The duty of the curator, so far as the statute prescribes it, consists in collecting and preserving the estate, making an inventory thereof, keeping it safely, and delivering it when required to the executor or administrator. From the provisions of the statute, the curator is regarded as a mere stockholder. There is no authority given him to administer upon the estate, and his whole power is limited by the object of his appointment. He may perform all acts necessary to preserve the property, and to make an inventory; but anything more is not warranted, we conceive, either by the letter or spirit of the statute. We do not admit

that he has the right or the power to collect money due on choses in action by suit. It is his duty to preserve all notes and papers belonging to the deceased, which come to his hands, and to pass them over to the executor or administrator, when required. The provision of the act of assembly, authorizing county courts to order the sheriff to proceed with the administration of estates under certain circumstances (1 Dig. 553), indicates very clearly that it never was the intention of the legislature to vest curators with more power than was necessary to preserve the estate. We do not admit that the appointment of Markham as curator was a void act, because the will of Richards had been duly recorded, and one of his executors had qualified in Virginia, before Markham's appointment, as is contended by the counsel for the plaintiffs.

On the contrary, we think that his appointment was valid for all the purposes contemplated by the statute; but we do not perceive any right resulting from the appointment which could justify Markham in becoming the representative of Richards in the prosecution of the suit against the representatives of Porter. The order of the court reviving the suit in the name of Markham was, therefore, erroneous. It was wrong for two reasons:

1. Because Markham's character, as curator, gave him no right.

2. If it did, the revivor should have been by bill, with proper allegations, to which the defendants might have filed answers denying the facts, and not by the *ex parte* order of court. The tenth section of the act of 1800, 1 Dig. 54, does not embrace the case, and if there be any other act authorizing a revivor in the manner here attempted, it has escaped our attention. The circuit court endeavored to correct the error, but not until the money had been paid to Markham. We do not perceive any reason why he should be permitted to hold money paid him, not under a decree, but whilst he was erroneously the complainant, in the place of Richards' executor or administrator. If A. has executed a note to B., and he dies, and C., in the assumed character of executor or administrator, sues A. for the money, and A. pays it before trial, believing C. entitled to it, but afterwards discovers that he was deceived, shall he have no remedy against C.? In such a case, the law most certainly implies an assumpsit on C.'s part to repay A. The payment to C. could not discharge A. from the demand in behalf of B.'s rightful representative. If A. permitted C. to get a judgment, and paid the money in pursuance of the judgment, he might be

without remedy until the reversal of the judgment. The principles of this case, supposed, seem to us applicable to the present controversy. Markham, without any decree in his favor, has obtained money to which he had no right. There is no consideration apparent upon the record which will justify his holding it. Law and justice unite in saying that he must pay it over to those entitled to it. The representatives of Richards are not bound by Markham's acts, and it would seem that an individual claiming to be administrator *de bonis non*, is endeavoring to collect the money from Porter's representatives.

Under the view of the subject we have taken, it is our opinion that the money may be regarded as belonging to the plaintiffs; and that it has been paid to the defendant through mistake, without any consideration passing from him. That the law implies an assumpsit in such a case, to account for the money to the right owner, is a proposition so clear, that we deem it useless to cite authority in support of it. We therefore think that the circuit court erred in instructing the jury to find as in case of a nonsuit. It follows, that the court should have granted the plaintiffs a new trial, and that the court erred in refusing it. Upon the return of the case, we will not say that Markham may not defend himself by showing that the judgment in favor of Richards remains in full force; that the plaintiffs are responsible for its amount; and that he has paid over the money in satisfaction thereof, which he received of Trimble. It will be time enough to decide these matters when the facts are fully developed.

Judgment of the circuit court reversed, and cause remanded for a new trial.

Plaintiffs in error must recover costs.

VOLUNTARY PAYMENT cannot be recovered. It is a general proposition that money which has been paid voluntarily, without fraud or imposition, and with full knowledge of the facts, can not be recovered back because no consideration was received for it: *Barkhamsted v. Case*, 13 Am. Dec. 92, note 94. The principal case is not opposed to the rule as stated.

TAYLOR v. LEWIS.

[2 J. J. MARSHALL, 400.]

JUDGMENT AT LAW CAN NOT BE IMPRACHED as fraudulent and void, by a bill in equity, when it appears that the sheriff, without combination with the plaintiff, returned process as executed, when in fact it never had been.

BILL in equity. Error to the Jefferson circuit. The opinion states the facts.

Denny, for plaintiff.

Crittenden, *contra*.

By Court, UNDERWOOD, J. Taylor recovered justice against Lewis, while he was a minor, for boarding. Lewis filed his bill in chancery, alleging that the amount had been paid before suit was brought, and that the process was never served upon him, although returned executed by the sheriff, in consequence of which he was prevented from making defense. The court decreed a perpetual injunction of the judgment at law, unless Taylor would consent to a new trial. Taylor refused, and has brought the case to this court. There is no evidence that the account for boarding was paid. The evidence conduces strongly to show that Lewis was not in the county on the day of the date of the sheriff's return. By presuming a mistake in the date of the return, the evidence might be reconciled with the idea that process was served on Lewis; but there is no foundation for such presumption. We shall, therefore, consider the evidence as irreconcilable with the return.

This question then arises, can Lewis impeach that return by a proceeding in chancery? If the bill had alleged a fraudulent combination between Taylor and the sheriff, to make a false return, so that judgment might be obtained without the knowledge of Lewis, we should have no doubt but that a court of chancery might grant relief, upon proving the facts. But where the plaintiff at law acts in good faith, and the sheriff returns the process executed, when in truth it never was, it is our opinion that the return is conclusive against the defendant, in favor of the plaintiff. If the sheriff acts contrary to his duty, he is responsible to the party injured. It would lead to mischievous consequences if the official return of an officer, in favor of a party acting in good faith, could be impeached in chancery, to the prejudice of the innocent party, and he made to suffer for another's wrong. We are clear that this ought not to be done collaterally, in a proceeding to which the officer whose act is to be impeached, is no party. The officer is no party in this suit. The evils resulting from tolerating an impeachment of a sheriff's return, collaterally, are pointed at in the case of the Sergeant of this court against George, 5 Litt. 199. And although the question is not there expressly settled, we think the intimation clear, from the reasons given, that the judges then on the bench would

have concurred with us. Regarding the sheriff's return as conclusive upon Lewis, he has failed to make out any grounds for the jurisdiction of a court of chancery. If he has been injured he has redress at law.

Wherefore, the decree of the circuit court is set aside and reversed, and the cause remanded, with directions to dissolve the injunction, with damages, and dismiss the bill with costs. The plaintiff in error must recover costs.

JUDGMENT AT LAW, based on false return of service of process. The rule stated in the principal case that a judgment can not be impeached in equity as fraudulent and void, when it appears that the officer, without combination with the plaintiff, has returned process as served on the defendant, when in fact the same never was served, can hardly be considered the prevailing rule at the present day. A few decisions are found affirming the same, but most of the modern authorities are opposed thereto. In 1852, the supreme court of the United States, in the case of *Walker v. Robbins*, 14 How. U. S. 584, gave its sanction to the rule as just stated. Walker filed his bill to set aside a judgment obtained against him, on the ground that he had never been served with process, although the marshal's return showed that he had. Catron, J., in delivering the opinion of the court, said: "Assuming the fact to be that Walker was not served with process, and that the marshal's return is false, can the bill in this event be maintained? The respondents did no act that can connect them with the false return; it was the sole act of the marshal, through his deputy, for which he was responsible to the complainant, Walker, for any damages that were sustained by him in consequence of the false return. This is free from controversy; still the marshal's responsibility does not settle the question made by the bill which is in general terms, whether a court of equity has jurisdiction to regulate proceedings, and to afford relief at law, where there has been abuse in the various details arising on execution of process, original, mesne, and final. If a court of chancery can be called on to correct one abuse, so it may be to correct another, and in effect, to vacate judgments, where the tribunal rendering the same would refuse relief, either on motion, or on a proceeding by *audita querela*." See, to the same effect, *Johnson v. Jones*, 2 Neb. 126. It has never been questioned that one branch of the jurisdiction of courts of equity was to grant relief in cases of fraud, sometimes concurrent with, and sometimes exclusive of, other courts: Story's Eq. Jur., sec. 184. It would seem to be one of those self-evident axiomatic propositions that might be safely asserted, without fear of successful contradiction, that no greater fraud can possibly be perpetrated than to deprive a person of his property without giving him an opportunity to be heard in its defense. To do so, is repugnant to our sense of natural justice, opposed to the underlying principles of all free governments, deriving their authority from a written constitution, and is seldom, if ever, sanctioned, except where might, and not right, prevails. Yet, the authorities just quoted undoubtedly have that effect, for when it is asked, and that, too, of those marvels of wisdom and guardian angels of the rights of persons, courts of equity, to relieve against the commission of such an outrage, fraud *per se*, it might truthfully be said, and to prevent one man through the medium of courts of justice from confiscating the property of another, their answer is, inasmuch as you have a cause of action against the

officer for making a false return, we will deny you the relief sought, allow the constitution to be violated, and your property confiscated. Fortunately, however, the authorities quoted have not been followed in this country. A contrary rule prevails, and a judgment at law may be vacated or relieved against in equity, when it is made to appear that it is unjust, and that the court in pronouncing it acted without jurisdiction: *Harshey v. Blackmarr*, 20 Iowa, 161; *Walker v. Gilbert*, Freem. Ch. 85; *Miller v. Gorman*, 38 Pa. St. 309; *Ridgeway v. Bank of Tennessee*, 11 Humph. 522; *Brooks v. Harrison*, 2 Ala. 209; *Crafts v. Dexter*, 8 Id. 767; *Ingle v. McCurry*, 1 Heisk. 26; *Bell v. Williams*, 1 Head, 229; *Esis v. Patton*, 3 Yerg. 381; *Landrum v. Farmer*, 6 Bush, 46; *Johnson v. Coleman*, 23 Wis. 452; *Freeman on Judgments*, sec. 495; *Owens v. Ranstead*, 22 Ill. 161; *Newcombe v. Dewey*, 27 Iowa, 381; *Stone v. Sherry*, 31 Id. 582.

A leading case in favor of the jurisdiction, and in which the reasons for maintaining the same are ably advanced, is *Ridgeway v. Bank of Tennessee*, 11 Humph. 525. Totten, J., speaking for the court, said: "We may conclude, then, that in the circumstances of this case there is no remedy at law against the judgment in question. The action for a false return is an inadequate remedy for such an injury; for it might be that after ruinous sacrifice, suffered in the payment of a judgment so recovered, and the delay and expense of litigation with the officer who made the false return, he might be unable to make the proper indemnity, or succeed in evading his liability. The fact that there is no remedy, or no sufficient remedy at law, for this admitted injury, is a strong reason why there should be remedy in equity. In the *Marine Ins. Co. of Alexandria v. Hodgson*, 7 Cranch, 332, Chief Justice Marshall says, 'that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' * * * Now, in the present case, this principle should apply with the greater force, because the judgment in question is to be considered as void by reason of an extrinsic fact, which can not be averred or be made to appear in a court of law, and a court of law has not therefore any power to arrest its execution, however unjust or iniquitous. * * * We can not doubt that in the view of a court of equity, it is unjust and unconscientious to attempt to enforce a judgment so obtained. We may further observe that if a sheriff make a false return and collusion with a party, or by mere mistake, a court of equity has an unquestionable jurisdiction to interpose, and give the appropriate relief; and to give effect to this remedy, the party injured should, of course, be permitted to aver against the truth of the return, and show it to be false, though it be matter of record." Notwithstanding the preponderance of authority is decidedly in favor of relieving a person from a judgment entered against him, when it appears that the court had no jurisdiction over the person of the defendant, yet it still remains undetermined whether equity will grant such relief, if it appears that there is an efficient remedy in the original case. In Kentucky, Tennessee, Iowa, Louisiana, and Wisconsin, it is held that equity will grant the relief sought, notwithstanding there may be a complete and adequate remedy in the original case: *Landrum v. Farmer*, 7 Bush, 46; *Caruthers v. Hartsfield*, 3 Yerg. 366; see, *contra*, *Blythe v. Peters*, Id. 378. The latter case was apparently overruled in *McNairy v. Eastland*, 10 Id. 309; *Connell v. Stelson*, 33 Iowa, 147; *Hernandez v. James*, 23 La. An. 483; *Johnson v. Coleman*, 23 Wis. 452; see, however, *State v. W. Co. Bank*, 20 Id. 640. In California, a different rule

prevails: *Bibend v. Kreutz*, 20 Cal. 109; *Logan v. Hillegass*, 16 Id. 200; *Sanchez v. Carriaga*, 31 Id. 170; see, also, *Hart v. Lazaron*, 56 Ga. 396.

A condition precedent required by courts of equity before they will enjoin the execution of a judgment at law, void for failure to serve the defendant with process, is that it must be averred in the bill and proved, that if the relief is granted a different result will be attained than that already decreed by the void judgment: Freeman on Judgments, sec. 498; *Gregory v. Ford*, 14 Cal. 138; *Coon v. Jones*, 10 Iowa, 131; *Secor v. Woodward*, 8 Ala. 500; *Gardner v. Jenkins*, 14 Md. 58; *Harris v. Gwin*, 10 Smedes & Mar. 563; *Fowler v. Lee*, 10 G. & J. 358. In *Gregory v. Ford*, *supra*, Baldwin, J., speaking for the supreme court of California, said: "Can a defendant, having no defense to an action, enjoin a judgment by default, obtained on a return by the sheriff of service of process, upon the ground that the return is false; that in fact he had no notice of the proceeding? It is difficult to see upon what principle chancery would interfere in any such case in favor of such a defendant. In analogy to its usual course of procedure, it would seem that the plaintiff, having acquired, without any fraud on his part, a legal advantage, would be permitted to retain it as a means of securing a just debt; and that a court of equity would not take it away in favor of a party who comes into equity acknowledging that he owes the money, and claims only the barren right of being permitted to defend against a claim to which he had no defense. It would certainly seem that it would be quite as equitable to turn the defendant in execution over to his remedy against the sheriff for a false return, under such circumstances as to relieve him from the judgment, and turn the plaintiff for redress to the sheriff." In Tennessee, a different rule prevails, and it is sufficient to maintain a bill in equity for the purposes mentioned, to show that the defendant was never served with process, without showing that the complainant has a good defense to the action in which the void judgment has been entered: *Bell v. Williams*, 1 Head, 229; *Ridgeway v. Bank of Tennessee*, 11 Humph. 523.

Another condition precedent to the right to obtain relief from courts of equity, whatever be the merits of the controversy, is that the application for such relief must be made promptly and without delay, and as stated by White and Tudor, in their note to the *Earl of Oxford's case*, vol. 2 Lead. Cases in Eq., part 2, 1372: "The rule is peremptory, and will not yield to the clearest proof that the cause of action was invalid, or that the effect of sustaining the judgment will be to compel the payment of a demand that was never due, or that had been satisfied." *Floyd v. Jayne*, 6 Johns. Ch. 479; *Smith v. Lowry*, 1 Id. 320; *Pichon v. McHenry*, 6 Blackf. 517; *McVickar v. Walcott*, 4 Johns. 510; *Graham v. Stagg*, 2 Paige's Ch. 321.

FITZHUGH v. CROGHAN.

[2 J. J. MARSHALL, 429.]

COMPLETE LEGAL TITLE is the right and the possession united.

SEISIN is a *nomen generalisimum*, and means *ex vi termini*, the whole legal title, and a covenant of seisin is consequently broken if the covenantor have not the possession, the right of possession, and the right or legal title.

DEED IS VALID BETWEEN THE PARTIES THERETO, without attestation, acknowledgment or recordation.

PROOF OF DEED BY ONE WITNESS is sufficient, as between the parties, and proof of the handwriting of one subscribing witness is sufficient, if all the witnesses are dead.

GRANTS MAY BE PRESUMED from a lapse of time, and generally, whatever will toll the right of entry, will create a presumption of a conveyance of the legal title.

COVENANTS FOR GENERAL WARRANTY OR FOR QUIET ENJOYMENT are essentially and exclusively prospective, and can not be broken without eviction.

COVENANT OF SEISIN IS BROKEN the instant it is made, or never, and the rights of the parties in an action for breach of the covenant, must be determined by the condition of the title at the date of the covenant.

COVENANT OF SEISIN is no covenant against incumbrances, consequently a mortgage, right of dower, or other equitable lien on land, is no breach of such a covenant.

EVICTIO IS NOT PER SE evidence of a breach of a covenant of seisin, but if at the date of such covenant the lands have been in the adverse possession of a stranger for the period required by the statute of limitations, there is a breach.

RECORD IN AN ACTION can not be used against a party, when it appears that if such party had been successful he could not have used the same to defend himself.

COVENANT. Error to the Jefferson circuit. The facts are stated at length in the opinion.

Denny and Haggin, for appellant.

Crittenden and Brown, contra.

By Court, **ROBERTSON, J.** On the fifth of January, 1818, Croghan sold and conveyed to Fitzhugh and Thruston part of a town lot in Louisville. He covenanted in his deed that he was seised of the legal title to the lot, and had a right to sell it. It appears that Croghan was in possession when he conveyed the lot, and that he delivered the possession to Fitzhugh and Thruston, who have since retained without eviction or disturbance. Apprehending that Croghan's title was defective, his vendees (the appellants), on the twenty-second of September, 1824, brought an action of covenant against him, averring, as a breach of his covenant, that he was not seised of the legal title, and had no right to sell and convey. Croghan pleaded that he was seised of the legal title to the lot at the date of his deed to the appellants. The case being tried on this issue, a verdict and judgment were rendered for Croghan, to reverse which this appeal was prosecuted. The principal errors relied on by the appellants are those which called in question Croghan's title. There are others, less important, which question the legality of instructions given by the court, and of opinions overruling motions to instruct the jury.

Before these are examined, however, a preliminary objection will be noticed. It is, that the plea is not responsive to the entire breach in the declaration, the latter charging a want of legal title and of right to convey, and the former averring seisin only. This objection is fallacious. If Croghan was seised of the legal title, he had a right to convey. A complete legal title is the "*juris et seisinæ conjunctio*," the title and possession united. This is the technical and legal import of the terms "seised of the legal title;" "seisin" means "*ex vi termini*," the whole legal title. A covenant of seisin is broken if the covenantor have not the possession, the right of possession, and the right or legal title. It would, therefore, be difficult to imagine a case in which a party could be "seised" and yet not have the right to sell and convey the legal title. "Seisin" is a "*nomen generalissimum*," which includes the right to sell; "*omne majus continet in se minus*." Croghan's title is derived as follows:

1. An act of the Virginia legislature of 1780, vesting the lots in Louisville in certain persons' trustees: 3 Littell's Laws, 540;
2. A deed from a majority of persons, calling themselves trustees of Louisville, to Pitman, dated the fourth of September, 1783;
3. A deed from Pitman to Woods, dated the eighth of February, 1810;
4. A deed from Woods to Luckett, dated the eleventh of April, 1812;
5. A deed from Luckett to Skidmore, dated the ninth of April, 1816;
6. A deed from Luckett, White, and Preston, to Skidmore, dated the fifth of May, 1816;
7. A deed from Skidmore to Croghan, the first of November, 1817.

The appellants object to the validity of the title thus deduced, and urge the following reasons in support of their objections:

1. That the persons conveying as trustees had no authority to pass the legal title, and that their deed was never properly acknowledged or proved;

2. That Pitman, by an indorsement on the deed from the trustees to him, assigned his right to the lot to William Johnson on the sixth of September, 1785, from whom the legal title had passed to others, between whom and Croghan there was no privity;

3. That Luckett had a wife entitled to a dower, who had never relinquished;

4. That Augustus D. and Juliet White had an interest in the lot adverse to the title of Croghan;

5. That those claiming under Johnson had, by a long continued possession, acquired a right to the possession of the lot, and that in consequence of that right one of them had recovered

judgment in an ejectment against Croghan. These objections were all disregarded by the jury and court below, and we think properly.

By the Virginia act of May, 1780, Louisville was established, and one thousand acres of land, declared to be forfeited by the patentee thereof, John Connelly, was vested in eight trustees, with power in any four of them to lay out lots, and sell and convey them, and to fill vacancies that might occur in the board of trustees by death or removal of any of its members. In May, 1783, another act passed, providing that, as John Campbell and Joseph Simon held a mortgage on the one thousand acres of land which had been appropriated for the town of Louisville as the escheated land of Connelly, "all further proceedings respecting the sale of the said lots and lands shall be, and the same are, hereby suspended until the end of the next session of the general assembly." By another act of October, 1783, so much of the act of May, 1780, as might affect the rights of Campbell and Simon was repealed. Another act of October, 1784, recognizing the sales which had been made of lots, directed that the proceeds of such sales should be collected and appropriated towards extinguishing the mortgage of Campbell and Simon, and declared that "the titles of the purchasers of lots in the town of Louisville, under the said act of May, 1780, shall be deemed valid against the claim of the said John Campbell and Joseph Simon, and their heirs or assigns."

The deed to Pitman is dated September, 1783, and signed by three of the trustees appointed by the act of 1780, and by James Patten, as a trustee, appointed by the board to fill a vacancy, and attested by two witnesses. On the trial, the original deed was read on proof of the death and handwriting of the subscribing witnesses, a copy certified by the clerk was also read, on which there was this indorsement: "At a court held for Jefferson county, April 6, 1785, the above deed was acknowledged by the trustees of Louisville to Buckner Pitman, and ordered to be recorded." On the original was the following indorsement: "1784, April court, O. record, recorded and examined, Book A, p. 147." A resolution of the trustees of Louisville, appointing James Patten a trustee in June, 1783, was also read in evidence. The plaintiffs offered in evidence the order book of the county court of Jefferson for 1784-5, to show that no order appeared in it for the admission of the deed to record at April court, 1784; but that there was such an order at April court, 1785, but the court refused to admit the order

book. Three objections are urged against this deed by the appellants: 1. That Patten was not a trustee; 2. That in 1783, the trustees had no power to convey; 3. That, as an original, the deed ought not to have been read to the jury; and passed no title, because it was not attested by three witnesses; 4. That the deed was not regularly proved by three witnesses, nor acknowledged and recorded within eight months, and, therefore, passed no title; and consequently the copy was inadmissible.

It is as well ascertained that Patten was a trustee in September, 1783, the date of the deed, as such a fact is susceptible of being proved. The order of the trustees appointing him one of their board, ought to be conclusive; but if it were not, the fact that he acted in that capacity in conjunction with others, who were appointed by law; that his authority was never doubted or questioned; that all who have ever held or claimed the lot have looked to the deed, signed by him, as the only source of their right; and that upwards of forty years had elapsed, during which the lot had been held and occupied under this deed alone, constitute a mass of presumption which it would be difficult, if not impossible, to resist. No title can ever be secure if this is to be declared invalid for want of any better evidence of the authority of Patten to act as trustee. We deem it unnecessary to cite any of the numerous authorities in support of this conclusion. Whatever might be the proper construction of the suspending act of May, 1783, and whatever practical operation it alone might have on the deed, the subsequent acts leave no room for questioning the validity of the deed, so far as the legal right to convey the lot can operate. The acts taken "*in pari materia*," show that the only object of suspending sales was to save the rights of Campbell and Simon. They show that those rights were secured; and the act of 1785 positively recognizes the sales that had theretofore been made, and legalized the proceedings of the trustees. So far, therefore, as the right of the trustees to sell and convey the legal title can have any effect, there can remain no doubt that a complete right was vested in Pitman by their deed.

No reason is perceived for the objection to the original deed. If it had never been recorded or proved, or acknowledged for registration, it would vest the legal title (no other objection being shown to it), except so far as the rights of *bona fide* creditors or purchasers might be concerned. The act of 1748, which was the law in force before 1785, required that deeds should be actually recorded within eight months from their execution or

acknowledgment. And it also required the attestation of three witnesses, as every subsequent act did until that of 1810 of this state. But the fourth section of the act of 1748 shows that these requisitions were made for the benefit of innocent purchasers and creditors alone, and without the required attestation, or recording the deed, if otherwise good, would pass the title as between the parties to it. The three witnesses were necessary only to prove the deed for recording. The recording was necessary only to secure the title against subsequent creditors and purchasers; and, therefore, between the vendor and vendee the title was not affected by an omission to record the deed, or to obtain the attestation of three witnesses who were required only to prove the execution in order to record it. The acts of 1785 and of 1796 also require the attestation of three witnesses; and that of 1810 requires the attestation of two only. But a deed sealed and delivered passes the title as between the parties without any attestation. The deed must be recorded or deposited, on proof or acknowledgment, to be recorded for the benefit of creditors and purchasers without notice. It can not be recorded since 1810 on proof, unless there be two subscribing witnesses; but if it be not recorded, nor even deposited for recording, it is good between the parties. The only difference between the act of 1748 and the subsequent acts, is that the one required the deed to be recorded in eight months, and the others required no more than depositing it in the proper office on proof or acknowledgment to be recorded.

As an original deed, therefore, to pass title to the vendee, it could be read on proof of its execution, whether three witnesses had attested it or not. The proof by one witness would be sufficient, and as both witnesses were proved to be dead, evidence of the handwriting of one of them was enough to authenticate the deed before the jury. So far, then, the legal title would be valid, unless there had been proof that there were creditors or purchasers who could hold the lot unless the deed of Pitman had been recorded. There is no such proof, or even intimation; and, therefore, the fact is to be taken as not existing. Besides, as the lot has been occupied, under Pitman's deed, ever since its date, or nearly so, the possession of it would be actual notice to the world that the title was not in the trustees, or any individual out of possession; so that it would be difficult to conceive of the existence of *bona fide* creditors or purchasers, who could take advantage of any omission to record the deed to Pitman. This objection to the evi-

dence, and to the title, is unavailing: See *Cotton v. Ward*, 3 T. B. Monroe, 312.

From what has been said, it results that it is not material whether the court erred or not, in suffering the certified copy of the deed, as a recorded deed, to be read to the jury. But in this, too, we concur with the circuit court. The indorsement showing that the deed was admitted to record in April, 1784, less than eight months from its date, is not contradicted by the order book, which was offered, but rejected by the court. We are not prepared to admit that it was necessary that the order book should show that the deed was admitted to record. The official indorsement on the deed would be evidence to show that the deed was acknowledged in April, 1784. The silence of the order book of that term of the county court does not necessarily contradict the verity of the indorsement. The clerk might have omitted, through inadvertence or mistake, to make the entry in his order book. The indorsement shows that the deed was ordered to record in April, 1784, and that it was recorded in book A, p. 147. This is not disproved, and is, therefore, to be accredited. Nor does the entry in the order book in April, 1785, necessarily contradict the indorsement made on the original deed. It only shows that there was an acknowledgment by the trustees in April, 1785. A reacknowledgment at that time might have been deemed necessary, or prudent, as the effect of the former acknowledgment might have been doubted in consequence of the suspending act of 1783.

But there is a general and effectual answer to this as well as all the other objections to the title derived from the deed to Pitman. It is found in the efficacy of the lapse of time and other incidental circumstances. These create presumptions in favor of the validity of the title, which supply the place of positive proof of facts, which, without their influence, would be required. Artificial or legal presumption is arbitrary, inflexible, and conclusive; it is the policy of the law, substituted for proof of facts, the establishment of which by moral testimony, or written memorials, is rendered impossible by lapse of time. This kind of presumption does not, in our opinion, apply to this case. But natural presumption (or such conclusion from facts as naturally, or by strong probability, will arise in a rational mind, enlightened by experience of cause and effect) must apply with a controlling influence. This shows presumption may be counteracted by opposing facts. And, therefore, it is not absolutely

conclusive. Such is the presumption, that after twenty years, a bond is paid off, a mortgage satisfied, the mortgagor remaining all the time in possession, the equity of redemption released, the mortgagee having enjoyed the possession twenty years, or the legal title conveyed to a purchaser, after twenty years' possession, etc.

These may all be combated by proofs or explanations, inconsistent with the inference of reason from the isolated facts, which, of themselves, would establish the presumption. And hence, their consideration belongs to a jury; as they are not exclusively conclusions of law, courts will not decide on them, but leave them to the jury, on hypothetical instructions. A jury may presume a deed, when neither the chancellor nor law judges will or can: Starkie, 1235; Id. 1216; Id. 1227; Peake's Ch. 25. Without some opposing probability, a jury will presume a deed, after a possession of twenty years, by one who had purchased the land, which, in consequence of his purchase, he shall so long have occupied: 2 Wm. Saunders, 185, a; Starkie, 502; Id. 1243; Id. 989; *Richards v. Williams*, 7 Wheat. 59. And under cogent circumstances, it is affirmed by Story, in 7 Wheaton, 109-10, that a deed may be presumed in less than twenty years. Grants may be presumed from lapse of time: 12 Co. 5; and most of the above authorities. In 2 Hen. and Mun. 370, a grant was presumed after forty-four years. Generally, whatever will toll the right of entry, will create a presumption of a conveyance of the legal title. Everything necessary to the validity of a collector's deed, will be presumed after twenty years, if it be shown that he was collector of taxes, which were committed to him: 14 Mass. 145; Id. 177; 10 Id. 105.

It is a maxim of law, which the facts will apply forcibly to this case, that "*omnia præsumuntur, rite et solemniter, esse acta, donec probetur, in contrarium.*" It is also a maxim, which is equally applicable, that when title is proved, every collateral thing necessary to its validity will be presumed. This maxim we know is usually applied to collateral acts, or facts which are rendered necessary, "*ex institutione homines,*" and not to those which are required "*institutione legis:*" 6 Co. 38; Bac. Abr. Ev. 639. But the facts which characterize this case would authorize the presumption that everything necessary to the perfection of the title has been legal, whether it be authority to make a deed or the execution, or proof, or acknowledgment, or recording a deed, according to law. If there had been no positive

proof of a deed, the jury would infer that one had been made. The trustees of Louisville could not, on the facts of this case, recover the lot, in any suit known to the law.

The title, therefore, must be considered in its origin, complete and indisputable. The indorsement to Johnson, on Pitman's deed, does not invalidate or impair the title transferred by Pitman to Woods. It is not a deed. It is without seal. After it was made, the legal right still remained in Pitman. A covenant of seisin is not broken by an outstanding equity. Hence, even if this indorsement transferred an equity to Johnson, Pitman was still seised of legal title; Johnson not having a legal title, his deed, and those which succeed it, under his right, did not vest a legal title to the lot. Whether Luckett had a wife or not, when he conveyed, does not appear with satisfactory certainty. His deed is signed and acknowledged by himself alone. It purports, in the body of it, to be a deed by Luckett and wife; and this is the only evidence that he had a wife. This would scarcely be sufficient evidence that he had a wife. The deed might have been written by some person who was mistaken in supposing that he had a wife, or he might have been associated with a woman who was ostensibly, but not legally, his wife, and, therefore, not entitled to any legal interest in the land, which it would be necessary for her to relinquish, by acknowledging the deed; or he might have had a wife when the deed was written, but none when it was acknowledged.

However, it is not necessary to decide what should be the effect of the deed on the question of Luckett's having a wife. For if he had one, who would be entitled to dower in the event of her survivorship, that fact would not affect the seisin of Croghan, nor of the alienee of Luckett. The right to dower in the estate of a living man, is contingent and remote. It is not a vested, or existing right. The husband has the whole legal title during his life, and consequently, imparts it without diminution to whomsoever he conveys it, by deed of general warranty. In a suit on a covenant of seisin, the only question is, was the covenantor seised of the legal title, at the instant when he made the covenant? If he were, his covenant is not broken. It is a covenant "*in presenti*," and can not be affected by supervenient facts or events. In this respect, it is unlike a covenant of general warranty, or for quiet enjoyment. These are essentially and exclusively prospective, and can not be broken without eviction. The covenant of seisin is broken the instant it is made, or never: 1 Touch. 169, 170; Dyer,

303; 9 Co. 60; *Greenby and Kellog v. Wilcocks*, 2 Johns. 1 [3 Am. Dec. 379]; *Hamilton v. Wilson*, 4 Id. 72 [4 Am. Dec. 253]; *Pollard v. Dwight*, 4 Cranch, 429.

A suit may be maintained, therefore, for a breach of a covenant of seisin before and without any eviction. It is a remedy for trying the title in advance, before the covenantee has been disturbed in his title or possession. If it turn out, on being scrutinized, to have been good, at the date of the deed, then the covenantee must be satisfied, and can have no right of action or cause of complaint against the covenantor, unless, by a subsequent breach of the covenant of warranty, or of quiet enjoyment, a new cause of action may occur on one of these latter covenants. The rights of the parties in a suit for a breach of a covenant of seisin, must be determined by the condition of the title at the date of the covenant. If the covenantor had not a perfect title at the date of his deed, he is responsible to the covenantee for damages, although he may have acquired the title before the trial, or even the institution of the suit; and consequently, as the rule is reciprocal, and the reason of it equally applicable to both parties, if the covenantor were seised of the legal title at the date of his covenant, no subsequent event affecting it can render him responsible for a breach of his covenant of seisin: 2 Saund. 171, c.; *Morris v. Phelps*, 5 Johns. 53 [4 Am. Dec. 323]. The covenant of seisin is not a covenant against incumbrances. And therefore no equitable lien on the land conveyed will create a breach of the covenant of seisin. Hence, if after a mortgage, but whilst the fee is in the mortgagor, he sell and convey the mortgaged premises to a stranger, and covenant with him, that he is seised, the existence of the mortgage is no breach of the covenant.

And according to this principle, as the supreme court of New York had decided in *Sedgwick v. Hollenback*, 7 Johns. 380; and in *Runyon v. Mersecaw*, 11 Id. 538; and in other cases, that a mortgagor before foreclosure is seised of the legal estate, therefore it was decided in *Standard v. Eldridge*, 16 Johns. 255, that a covenant of seisin to a stranger, by a mortgagor, before a foreclosure of the equity of redemption, is not broken by the existence of the mortgage. The expectant right of a wife to dower whilst her husband is living, can not be, if it be anything in law, more than an incumbrance, and a very contingent one. Perhaps the husband may survive the wife. Her potential claim to dower, therefore, can not have even as much effect on the covenant of seisin by the husband, as an equitable lien

or other existing incumbrance would have. It is manifest, then, that if it had been clearly proved that Luckett had a wife when he conveyed the lot, that fact would not tend, in the slightest degree, to show a breach of the covenant of seisin.

But there would be another answer to this objection to Croghan's title. Luckett's deed was acknowledged more than seven years before the trial. If the wife be proved once to have been alive, she will be presumed, for a reasonable time, to be still living, until the contrary be shown: 2 Roll. 461. But what this reasonable time shall be, is the question. In England, it has been decided, in analogy to the statute of bigamy there, that after the expiration of seven years, from the last time that the wife was shown to be alive, she will be presumed to be dead: Starkie, 218; Id. 457. There being a similar statute in Kentucky, it might not be unreasonable to establish the same rule here. If Luckett ever had a wife, it might, therefore, be presumed that she was dead when this case was tried, or at least it might impose upon the appellants the burden of proving that she was then living. Unless she was not only then living, but shall survive the husband, the title remains unincumbered by dower. There is not only no proof, that Augustus D. and Juliet White, had any legal right to the lot, but it is pretty evident that they had not. The deed to their mother, from which it must have been supposed that they derived some title, is "to her and her heirs," in the usual form. These are words of "limitation," and vested a fee simple estate in her. And, therefore, she having conveyed her title, her children have no interest whatever in the lot derived from the deed to her.

It does not appear that those claiming under Johnson had been in possession twenty years. And if they had been, as they held under the title of Pitman, and by executory contract merely, their possession could hardly be considered adverse to Pitman, or to those claiming by deed from him. Whatever effect a judgment in ejectment against Croghan, in favor of these claimants, might have in showing that he was not seised, can not be material in this case, because the judgment does not, of itself, show a breach of the covenant of seisin. If the appellants had a right to use this judgment as evidence against Croghan, it would only prove the fact that there was a judgment. It would not prove that Croghan had not title in 1818, nor that those who obtained the judgment had a paramount title. Nor does the judgment show the demise. Hence it does not appear whether the demise was laid before the date of

Croghan's covenant. The judgment was rendered in October, 1824, more than six years after the date of the covenant; the demise may have been laid after 1818; and as a recovery in ejectment, when properly used as evidence to prove want of title in him against whom it was had, could only prove it to the extent of the demise, consequently this judgment alone can not show that Croghan had not title in 1818.

An eviction is not *per se* evidence of a breach of a covenant of seisin. The covenantor must be shown not to have been seised at the date of his deed. An eviction, and consequently a judgment, will not show this, unless it be proved that the successful party had a superior title. Proof of such title, without either judgment or eviction, would show a breach of the covenant of seisin. And hence, if it had been proved that any person unconnected with Croghan had the fee, or had, before 1818, acquired the right to the possession of the lot by twenty years' continued adverse occupancy, Croghan would thereby be rendered liable to the appellants on his covenant of seisin. It is not proved that any person had acquired any such right. The judgment does not show it. And the testimony of the witness who swore that the judgment was obtained on an adverse possession of twenty years certainly does not prove it. This is an attempt to prove what witnesses swore on the trial of the ejectment. But it does not prove that what they swore was true. Such testimony, for such a purpose, would be illegal and inadmissible. The witness did not swear that there had been twenty years' possession, adverse to Croghan. If this had been shown, Croghan would have been convicted of a breach of his covenant. There is nothing in the record which does prove, or even tend legitimately to prove it. Nor is it probable, from anything in the record, that such a fact exists, because all the claimants seem to have held under the same title, and the possession under Johnson was without a legal title by deed.

But there is yet a stronger objection to using the judgment in ejectment, or the whole record of the suit, as evidence in this suit against Croghan. The appellants who attempted to use it were not concluded by it. In a suit against them it would not be evidence. Ought they then to be permitted to make use of it against Croghan? The rule is reciprocal. If the record could not be evidence against the appellants, it should not be for them. Croghan, if he had succeeded in the ejectment, could not have introduced the judgment in his favor as evidence that he was seised of the legal title. As, therefore, the

record could not be evidence for him, it ought not to be read against him. If, by adverse possession by another, or in any other way, Croghan's legal title had been affected, it should be proved, as other facts are usually established. If it had been proved, in the trial of the ejectment, that there had been twenty years' possession adverse to the right of Croghan, it might have been proved by the same witnesses in this case. And if any such fact had been thus established, the appellants would have been entitled to judgment. But, for the reasons which have been suggested, the circuit court did right in disregarding the judgment, and in excluding the record in the ejectment. No other objection to Croghan's title having been made or perceived, than those which have been noticed by the court; the conclusion, therefore, is, that there was no proof of any breach of his covenant of seisin.

The points growing out of the instructions, and of motions for instructions, have all, except one, been virtually decided in the foregoing examination of the question of seisin. That one is involved in a motion by the appellants for an instruction "that the jury had a right to presume a conveyance by Pitman to Johnson anterior to that of Wood." The court refused to give the instruction. And whatever its reason may have been, its opinion was correct. The proposition was abstract. There was no proof of twenty years' continued possession under the purchase by Johnson, or any other possession which would authorize the presumption that Pitman had conveyed to him the legal title. The bare fact of a sale would not create the presumption of a deed without a long possession taken and held in consequence of the sale, and not consistent with any other right than that acquired by the sale. There being no proof of any such facts, the court did not err in withholding the instruction.

Judgment affirmed.

COVENANTS OF SEISIN, breach of, what amounts to: *Lot v. Thomas*, 2 Am. Dec. 354; *Whitbeck v. Cook*, 8 Id. 272, note 282; *Gilbert v. Bulkley*, 13 Id. 57, note 59.

COVENANT OF WARRANTY, when broken, and what may be recovered as damages upon a breach: *Horsford v. Wright*, 1 Am. Dec. 9, note; *Cummins v. Kennedy*, 14 Id. 53, note.

ROBBINS v. TREADWAY.

[2 J. J. MARSHALL, 540.]

AMENDMENTS ARE LARGELY within the discretion of the *nisi prius* court, but this is a legal discretion, which, if abused, will be corrected on appeal.

OPPROBRIOUS WORDS are not libelous.

PUBLICATION THAT CHARGES A JUDGE with being destitute of the capacity and attainments necessary for his station, or that he openly abandoned the common principles of truth, or that he sold, directly or indirectly, the appointment of clerk, is libelous.

PUBLICATION THAT CHARGES A JUDGE with improprieties, which would be no cause of impeachment or address, is no more actionable than if made against a private citizen.

CASE. Error to the Jessamine circuit. The facts are stated in the opinion.

Mills and Brown, for plaintiff.

Monroe, Haggin, and Depew, contra.

By Court, ROBERTSON, J. This was an action on the case, for a libel alleged to have been published by the defendants against the plaintiff, as a circuit judge. We shall deem it necessary to consider only two questions; they will comprehend all others: 1. Did the court err in suffering the defendants to withdraw pleas which they had filed, and to file others? 2. Was any of the testimony admitted for the defendants illegal and inadmissible?

At the July term, 1826, the defendants filed two pleas, not guilty and justification. At the October term succeeding, the plea of justification was withdrawn by all the defendants, except Mason and Jameson. At the April term, 1827, the court permitted the defendants to withdraw their pleas, without any other reason assigned than that they were defective; and afterwards, during the same term, they filed a plea of justification alone. That the circuit courts have an extensive discretion in their superintendence over the pleadings, must be conceded. It may also be admitted that this court will seldom control the exercise of that discretion. But, like everything else judicial, it has limits, within which it must be circumscribed. It is a legal discretion. It may be abused; when it shall be, this court must interpose. We think that it has been improvidently exercised in this case. The issue was complete on the plea of not guilty. The plea itself made the issue; a similiter was not essentially necessary. There was an affirmation on one side, and a negation on the other.

After the pleas had been filed, and one issue virtually made up, the court ought not, at a subsequent term, to have permitted a withdrawal of them without good cause. No such cause was assigned. The plea of justification was defective; no issue had been taken upon it; and, therefore, the circuit court might have permitted the withdrawal of that. But the plea of not guilty was certainly not deficient in form or in substance. No sufficient reason is assigned for withdrawing it. There could have been no motive for the motion for leave to withdraw it but a wish to obtain the right of opening and concluding the cause, which had been conceded to the plaintiff by the pleadings as they stood. Such a movement was well calculated to surprise the plaintiff. He had prepared for trial on the issue of not guilty. He had been required to prove the libel. He had, as may be supposed, summoned witnesses to prove it. It was not just, therefore, for this reason alone, to permit the withdrawal of not guilty, unless some cause had been shown for it, much better than that which was assigned. The rights of the parties are equal. Neither should be permitted to take any undue advantage of the other. After the plaintiff had become entitled to the right of opening and concluding the cause, the defendants ought not to have been allowed to deprive him of it, without his consent or without showing a good cause for it. It is not shown, or even pretended, that the withdrawal of the plea of not guilty would be conducive of justice or a fair trial. And, therefore, the court erred in permitting the defendants to withdraw the plea of not guilty. The case of *Rochester v. Dun*, 1 Bibb, 412, is directly in point; and no statute passed since that decision, for the regulation of pleadings, can, in the slightest degree, affect the reasoning employed in it by the court, nor decisive application of it, to this case.

The court, also, admitted illegal testimony. This is the second and more important branch of the case. The publication, charged to be libelous, contains many opprobrious epithets; but these are not libelous: 3 Starkie on Slander, 100-11; *Id.* 340-42. Only three specific charges against the plaintiff, for which he could maintain an action, can be deduced from the libel: 1. That he lacked capacity as a judge; 2. That he had abandoned the common principles of truth; and, 3. That he had made the office of clerk a subject of private negotiation between men to whom he was under personal obligations, and endeavored to cancel those debts by a barter of office. This last charge is actionable so far, and so far only, as it imports the

imputation of corruption in office. Any thing which assails the integrity or capacity of a judge is actionable. See the authorities, *supra*. If it could be proved that the judge sold his patronage, or derived any pecuniary advantage from its bestowment, in the selection of his clerks, this charge would be justified. But as it is a charge of sale and corruption, nothing but proof of such sale and corruption can justify it. To charge a judge with improprieties, which would not be cause of impeachment or address, would be no more actionable than would be the same charge, made against a private citizen. This is the law, even of England. It must be so in this land of republican equality.

In support of each of the three charges, evidence was admitted by the court, which was clearly irrelevant and illegal. To prove incapacity, the defendants were permitted to ask witnesses the opinions of persons who were not witnesses. They were permitted to prove the opinion, at or about the time of the libelous publication of the Montgomery bar. This was surely illegitimate. The capacity of the judge must be ascertained by the opinions of intelligent witnesses. It is not allowable to prove the opinions of men who are not sworn, or even public opinion. Such evidence as that admitted on this point is not even as good as rumor. Who can swear what another's opinion is on any subject? No prudent man will venture to do it. And if a witness should make the adventure, what is his evidence more than that he heard the individual express an opinion? Does he know that he was honest, candid, and disinterested in that opinion? Does he know that he would have sealed it by a judicial oath? Does he know that he was not provoked by passion, or influenced by malice or prejudice; and can the jury know whether he was a competent judge of the intellectual capacity or legal attainments of judges? Every opinion must be given on oath. No man's reputation would be safe if such evidence were tolerated as that to which we have alluded.

Nor was the record of a decision by Judge Robbins legal evidence. If one decision is admissible, every other must be equally so; and, consequently, the farce might have been exhibited of subjecting to the scrutiny and revision of the jury, for approval or reversal, every judicial opinion which Judge Robbins ever gave. If the defendants have the right to read as evidence, the record of an opinion which they suppose will tend to prove incapacity or imbecility, the judge would certainly have the reciprocal right of reading such as he might suppose evidences of his

fitness and learning. But shall a jury gravely pass judgment on the correctness or incorrectness of the decisions of a judge? If they may, the order of things must be inverted, and no judge will be able to stand. For there never lived, nor will there ever live, one who could pass, unhurt, such an ordeal.

The mode, and only one, of trying the capacities of judges, is to ascertain the opinions, on oath, of honest and intelligent witnesses. The excitement in Montgomery at the time a clerk was appointed, or at any other time, was entirely irrelevant to the issue. Deplorable would be the condition of every citizen if the security of his rights depended on popular passion or impulse alone. If he be persecuted, is the fact that he is the victim of denunciation evidence that he deserves to be? If lawless men should raise a mob to drive him from his purpose, or punish him for a supposed offense, is their commotion proof of his demerit or guilt?

But more deplorable still would be the condition of the judiciary, if tumultuary scenes, produced and excited for the avowed purpose of overawing a judge, should be tolerated as evidence of the judge's incapacity or corruption. The fact that some of the people of Montgomery were excited proves only that they were excited. It might prove also that their conduct was unworthy of them as intelligent men and peaceable citizens. But how it could prove that Judge Robbins was incapable or corrupt, we can not imagine. He may have been imprudent. He may have erred. On this subject we can not adjudicate. But if he erred, it must be proved by other evidence than the clamor excited against him in Montgomery or elsewhere. It is to escape the consequences of this outcry that he has appealed to the laws of his country. If Judge Robbins recommended or connived at any petty negotiation or barter between candidates for clerkships, he deserves reprehension. Such conduct can not be approved. It would be an indiscretion which nothing could justify, and one which would be well calculated to bring the judiciary into suspicion and consequent discredit. While it is necessary to the proper administration of the laws that the judges should be pure and independent, it is equally necessary that they should be prudent, and habitually attentive to the proprieties of their stations. The plaintiffs as well as the defendants may desire a judicial investigation of this matter, but it can not be indulged under any legal issue. Proof that Judge Robbins has been guilty of such an indiscretion could not justify the charge of his bartering in offices, nor of his can-

celing any of his obligations by the appointment of clerks. Sale of his patronage, a prostitution of his office to mercenary purposes, is the gravamen of the libel; and it is to this that the plea and the proof should be restricted. Nothing which does not impeach his integrity is pleadable or provable in justification of this charge. There is a difference between the malignity and injuriousness of words spoken or written. And, therefore, words may be libelous which would not be slanderous: 2 Wheaton's Selwyn, 795. Any malicious publication in writing, which tends to render a man or a magistrate ridiculous, or to exclude him from society, or remove him from office, is a libel.

But in this country, nothing is libelous against a judge which would not be so against a private citizen, unless it tend to his removal from office. To charge a judge or a citizen with "openly abandoning the common principles of truth," is libelous. But to charge either with erring in judgment, or with disregarding public sentiment, is not libelous. And, therefore, most of the reproachful phrases and words in the publication, for which this suit was brought, are not embraced in the issue, and consequently no testimony in relation to any such irrelevant matter should be indulged on either side. Whether the people or the judge erred, or erred most in the scenes of violence which occurred about the time Stonestreet was appointed clerk, is not a fit subject of inquiry in this suit. Nor is it proper to investigate the question whether the judge ought to have appointed another person clerk, or should have sacrificed his own opinion of his duty to the wishes of those who may have instructed and attempted to control him. The proper inquiry is: 1. Was the judge, at the date of the libel, destitute of the capacity and attainments necessary for his station? 2. Did he openly abandon the common principles of truth? and, 3. Did he sell, directly or indirectly, the appointment of clerk? Any evidence which will prove or legally conduce to prove either of these charges would be admissible. No other would be. And they all must be proved before the libel can be justified.

Pleadings will lose their object if the evidence be not circumscribed by the issues which they conclude. The issue in this case was of the threefold character which has been explained. For whatever else the libel or the plea may contain, the whole mass results in these three points when analyzed and subjected to the test of the law.

The court did not err in rejecting the evidence offered by Judge Robbins, which was intended to show that he was a good

judge at the time of the trial, or that the people of Montgomery, or the bar in that county, had changed their opinion. This matter would be as impertinent to the issue as any of that of which we have spoken. But if the latter were admissible, surely the former would be equally so.

The proper inquiry as to capacity is not what was the opinion of the witness at the date of the libel; but what is his opinion now of the judge's qualifications then? And it should be, what does he think, not what do others think, or what did they think. The cause has been conducted throughout in an irregular manner. When it shall return to the circuit court, it should be kept strictly within the issue. No plea of justification will be good, unless it justify the three libelous charges which have been designated; want of capacity, an open abandonment of the common principles of truth, and a sale, direct or indirect, by the judge of the appointment of clerk. The special plea which was filed is not sufficient.

Judgment reversed, and the cause remanded for a new trial, to commence from the plea of not guilty, and to be conducted conformably to this opinion.

The plaintiff in error must recover his costs.

CRAIG v. MARTIN.

[8 J. J. MARSHALL, 50.]

COVENANTER HAVING ELECTED TO SUE AT LAW for damages for breach of contract, equity will not compel him to give up his judgment and accept specific performance, unless the judgment has been procured unfairly, or he has been guilty of fraud or negligence.

VENDOR BEING IN POSSESSION, equity will, upon the vendor's application, decree a specific performance, although the time fixed in the contract for conveying has elapsed, if the vendor is not in fault, but the delay has been caused by the state of the title.

TIME IS NOT THE ESSENCE of such a contract, and if a good title can be made in a reasonable time, it is sufficient.

VENDOR IN POSSESSION, disaffirming the contract, and recovering damages for non-conveyance, is liable for rents, subject to the value of improvements placed by him on the land.

ERROR to the Pulaski circuit. Bill in chancery. The opinion states the facts.

Denny, for plaintiff.

Crittenden, contra.

By Court, ROBERTSON, J. Patton, Hackley, and Greenhow, being the owners of thirty-six thousand acres of land, on Richland, in this state, entered twenty thousand four hundred and six and one quarter acres of it in 1796, for taxes. The taxes not having been paid on it for the years 1800, 1801, 1802, and 1803, it was exposed to sale, by the register, for the amount due, and John Logan, Joseph Welsh, and John Ballinger, jointly purchased nine thousand and fifty and one quarter acres of it, for sixty dollars and ninety-two and one half cents. Logan afterward claiming the whole nine thousand and fifty acres, as purchaser of the interests of Welsh and Ballinger sold two hundred acres to Andrew Craig, and executed to him a bond for conveyance. Craig sold the two hundred acres to Michael Myers, to whom he delivered Logan's bond, without assignment, and his own bond, binding himself to procure for Myers, or any other person who might purchase from him, the title from Logan, on or before the thirteenth day of May, 1817. This bond being assigned to Richard Ballinger, he assigned it, and also delivered Logan's bond to Zaddock Martin, on the twenty-third of May, 1816, who shortly afterward settled on the land.

In September, 1819, Logan, Ballinger, and Welsh being dead, and no title having been made to them, or either of them, by the register, nor any by Logan to Craig or Martin, Craig brought a suit in chancery against the register, the heirs of J. Ballinger, and the unknown heirs of Logan and Welsh, and against Patton, Hackley, and Greenhow, for the title. In July, 1820, Martin recovered a judgment against Craig, on his bond, for seven hundred and fifty-four dollars, and costs.

To enjoin this judgment, and compel Martin to accept a conveyance for the land, in lieu of it, whenever the title could be obtained, Craig filed an amended bill, making Martin a party, and charging that Martin had never intimated to him, during the life of Logan, that he was desirous to obtain a title, and that if he had, he would have procured one for him; but that after Logan's death, Martin, knowing that a title could not be made instantly, demanded one, but refused to surrender to him Logan's bond to enable him to procure it for him. An injunction being granted, Martin answered, and alleged that he had been anxious to obtain the title, and had manifested his anxiety to Craig, without effect; that he knew nothing of the state of the title when he bought Craig's bond from Ballinger; that he did not believe a good title could be pro-

cured; that he had made valuable improvements on the land, but having despaired of ever obtaining a title, he had been compelled to sell at a sacrifice, and had removed to Missouri; that he offered Craig a copy of Logan's bond, protested against the injunction, and resisted a specific execution, if Craig could even succeed in getting a title.

The case being heard on the amended bill, the injunction was dissolved with damages, and the bill dismissed with costs. To reverse this decree, this writ of error is prosecuted with a *superedeas*. When the decree was rendered, the whole case as to all parties was prepared for hearing; there had been regular publications against the unknown heirs, and against Patton, Hackley, and Greenhow, and the heirs of J. Ballinger had answered by their guardian *ad litem*. In the mean time, the register had made to Craig a deed, in obedience to an act of assembly directing him to do so. This act could not divest the original owners, or the purchasers at the register's sale, of their rights to the land. As to them, if they, or any of them, should choose to assert right, the act was without authority, and, consequently, would be void. But if this deed did not vest in Craig such a title as would enable him to pass a good and perfect title to Martin, he had prepared his suit in such a manner as to present a strong claim in equity to a decree for a title. We will not, however, now decide, whether he has shown himself entitled to a decree for a title; because, as we shall be compelled to decide that the circuit court had no right to enforce a specific execution against the will of Martin, it would be premature to give any other decision which might affect the right of persons not now before us, and which are, as far as we know, "*sub judice*" in the circuit court.

If it were admitted that, when the decree was rendered, Craig was entitled to a decree for a title, nevertheless he had failed to show that his injunction against Martin's judgment ought to have been perpetuated, and Martin compelled to accept a title when decreed to himself. Martin had elected to sue at law for damages for a breach of Craig's covenant for a title. He had fairly obtained a judgment. The chancellor should not control this election, and deprive him of his judgment, unless he had procured it unfairly, or had been guilty of fraud or culpable negligence, which occasioned or contributed to the omission of Craig to procure the title for him, or which lulled Craig, without any fault on his part, into security and passiveness. It not only does not appear that Craig could have procured the title,

but it is shown, undeniably, by his own bills and other facts in the record, that it was impossible, by any ordinary legal means, for him to have made to Martin a good title, within the time stipulated in his covenant. The register had refused, and for a sufficient reason, to make a deed to Logan and company.

But it was not the duty of Martin to demand a deed; the time for making it was fixed. It was Craig's duty to procure the title, and convey it to Martin on or before the thirteenth of May, 1817. He made no effort to do so, and it is not shown that, until after that time, Martin manifested any indisposition to receive a title, or that he did or omitted to do anything which lulled Craig, or obstructed any effort by him to obtain the title. Nor does it appear that Martin was ever unwilling to receive the title before he removed or determined to remove to Missouri, which was long after the breach of the covenant by Craig. There is no principle of equity, nor any authority of any court, which would tolerate a perpetuation of Craig's injunction, under such circumstances as those which characterize this case. But the case of *Royster v. Shackleford*, 5 Litt. 228, and of *Oldham v. Woods*, 3 Monroe, 47, and many others which might be cited, conclusively show that in such a case as this, the vendee should not be compelled to accept a title and surrender his judgment for damages. The case of *Cotton v. Ward*, 3 Id. 312, is not, when scrutinized, an opposing authority. No principle settled in this case is inconsistent with that established in those first cited. Cotton had conveyed the title to Ward and put him in possession, and having obtained a judgment against him for a part of the consideration, Ward enjoined it for alleged defects in the title. Pending the injunction, Ward brought a suit for a breach of the covenant of seisin, and recovered damages. Cotton filed an amended answer, in the nature of a cross-bill enjoining this judgment, and being able to exhibit, on the hearing, a perfect title, Ward's injunction was dissolved, and Cotton's perpetuated, whereby Ward was compelled to keep the title, and give up his judgment for damages.

The contract was not executory; it was executed. And every intelligent lawyer will instantly recognize the essential difference in the equity incident to executed and executory contracts. The cases are comparatively few in which an executed contract will be rescinded, without proof of fraud.

There is another distinguishing and important circumstance, peculiar to the case of *Cotton v. Ward*. When Ward recovered his judgment for damages, a suit was pending (brought by him-

self), in which the question to be decided was, whether he should be compelled to hold to his title, or should be allowed to rescind his contract. For the only alternative in that case was a dissolution of his injunction, or rescission of his executed contract. His attitude was, therefore, different from that in which this record presents Martin; and the rule of equity which should govern each case is as different.

The cases are numerous in which the chancellor will decree a specific execution, on the application of the vendor, after the time stipulated for a conveyance. Such a decree will be proper, whenever the vendee is in possession, and the vendor, without any positive fault, has omitted, or, on account of the state of the title, has been unable to comply punctually with his covenant. Generally, in such cases as this, time will be considered by the chancellor as not essential, and if the vendor can procure a good title the vendee will be compelled to accept it. Such a decree, in such a case, would be consistent with the fundamental and universal principles of equity. If, in such a case, the title can be made in a reasonable time, the vendee will be compelled to take it: 1 Mad. Ch. 349. And time will even be allowed, in some cases, to enable the vendor to procure title: Sug. Ven. 252.

The reason of this doctrine of equity applied with decisive effect in the case of *Cotton v. Ward*. But it does not apply in the slightest or remotest degree to this case, or to any such case as this. It is restricted to cases in which the vendor applies for a specific execution, before the vendee shall have disaffirmed the contract, and sought redress in a court of law for the breach of it by the vendor, or in which the delay in making the title resulted, not from the negligence or delinquency of the vendor, but from a defect in the title, which rendered it impossible to procure a perfect title before a recovery of damages fairly at law; for a failure to convey against the day designated in the covenant and of which defect the vendee had notice when he bought the land.

We have seen no case either the letter or reason of which would sanction a decree compelling Martin to surrender his judgment. Nothing fraudulent or delusory is proved against him, nor is it shown that he knew the title was defective when he bought. But still there is error in the decree. Martin had occupied the land several years. This was beneficial to him and prejudicial to Craig, as the land must devolve on Craig. Equity would, therefore, exact of Martin some allowance for rent. The

prayer for general relief by Craig authorized a decree for the profits. If these exceed the value of the valuable and lasting improvements made by Martin, the residuum should have been decreed to Craig. The court ought, therefore, to have taken an account of the rents and of the improvements, and if the former had exceeded the latter, decreed a perpetuation of the injunction, "*pro tanto*." See *Oldham v. Woods*, 3 Monroe, 47. Martin recovered interest on the consideration.

Wherefore the decree is reversed and the cause remanded with instructions to institute such proceedings, and render such decree as shall be conformable to this opinion.

TIME, WHEN THE RESCUE of a contract, see note to *Benedict v. Lynch*, 7 Am. Dec. 492.

READING v. PRICE.

[3 J. J. MARSHALL, 61.]

JUDGMENT BY A COURT OR MAGISTRATE acting without jurisdiction is a nullity, and is no bar to a suit subsequently instituted on the same cause of action.

PLAINTIFF CAN NOT RECOVER HIRE OF SLAVE, if he knew the slave was unsound, and fraudulently concealed it from defendant, providing the latter, within a reasonable time after discovering the fraud, offered to return the slave and rescind the contract.

ASSUMPT. Error to the Franklin circuit.

Monroe, for plaintiff.

Mills and Brown, contra.

By Court, ROBERTSON, J. This case presents in various forms several points; but they may all be resolved into two propositions: 1. Is a judgment by a magistrate in favor of a plaintiff, in a case in which the justice had no jurisdiction; or is a judgment in the same case in favor of the defendant, in the circuit court on an appeal, a bar to a suit afterward instituted, on the same cause of action, when that judgment was rendered for want of jurisdiction in the magistrate? 2. Can the plaintiff recover for the hire of a slave, when the defendant can show that the slave was unsound, and the plaintiff, knowing the unsoundness, fraudulently concealed it, and the defendant, within a reasonable time after discovering the fraud, offered to return the slave, and rescind the contract?

As to the first, it is clear that if the magistrate had no jurisdiction of the subject-matter, his judgment is a nullity, as must

be also that of the circuit court on an appeal, so far as this suit is concerned. There is enough in the record to show that in this case, the justice had no jurisdiction. The contract was for the payment of forty dollars in chairs, and it was made before the enlargement of the jurisdiction of magistrates by the act of 1828. Therefore, as the want of jurisdiction is shown by the record, it results that neither the judgment by the justice nor that by the circuit court was a bar to this suit.

On the second question we have as little doubt. Although the slave may have been unsound, nevertheless, if her services were worth anything, as the contract for hiring was executed, there was not an entire failure of consideration, and, therefore, on that ground alone the defendant below was entitled to a verdict. But if a fraud were practiced on him in the contract, and he offered a rescission within a reasonable time after discovering it, the contract was *ipso facto* rescinded, and no action could be maintained to enforce it. This is a well-established doctrine of the law, and is so plain and familiar that it would be vain and useless to cite authorities to prove it. The circuit judge thought otherwise, and not only refused to instruct the jury that such was the law, but instructed them that the defendant could not escape a verdict by proving the fraud and offer to rescind within a reasonable time, unless he also proved that the services of the slave were worth nothing.

This instruction is indefensible. If there had been no fraud and offer to return the slave, the fact of the value or worthlessness of the services of the slave would have been material; but if there was fraud and an offer, within reasonable time, to rescind, the contract was nullified by operation of law, and could not afterward be the foundation of a suit. Whether there was fraud, or whether, if there were, there was also an offer, within a reasonable time, to rescind the contract, were facts for the consideration of the jury. But the court did not permit them to decide on these facts, and, therefore, the court erred.

The evidence conduced to prove these two essential facts, and was of such a character as to have authorized a verdict for either party. The jury, therefore, might have found for the defendant below, if they had not been misinstructed.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded for a new trial, to be conducted conformably to this opinion.

BULLOCK v. POTTINGER'S ADMINISTRATOR.

[S J. J. MARSHALL, 84.]

COVENANT TO PAY A SUM OF MONEY "when I collect the money due on a bond upon which suit is now pending," is broken if there is no such bond nor suit pending.

COVENANT. Appeal from the Nelson circuit. The opinion states the facts.

Chapese, for appellant.

Crittenden, contra.

By Court, UNDERWOOD, J. Bullock was sued, in an action of covenant, on the following instrument:

"Know all men, by these presents, that I, John Bullock, do bind myself, my heirs, etc., to pay unto William Pottinger the interest on the sum of one hundred and eighty-seven dollars, forty-two cents, from the second of September, 1806, until paid, which said interest is not to be paid until I collect the money due on a bond given by Henry Kirkham and Michael Kirkham to said John Bullock, and on which bond a suit is now pending in the Barren circuit court. I further bind myself to pay unto the said Pottinger his costs of a suit now pending in the Nelson circuit court, wherein the said Pottinger is plaintiff, and myself defendant.

JOHN BULLOCK. [Seal.]"

"October 7, 1817."

The declaration contained three counts. The first averred that Bullock had received and collected the money due on the bonds executed by the Kirkhams. The second averred that the money on said bond could have been collected by reasonable diligence; that full and ample time had elapsed, but Bullock had carelessly, willfully, and intentionally failed and neglected to collect the debt due on the bond of the Kirkhams. The third avers that Bullock never held a bond executed to him by the Kirkhams, and that no suit was ever instituted in the Barren circuit or elsewhere on any such bond. Bullock, by appropriate pleas, contradicted these several averments, and also pleaded covenants performed. Issues were found upon the several pleas, and a trial had. Verdict and judgment for the plaintiff below.

Upon the trial Bullock introduced a witness, and offered to prove that the Kirkhams were insolvent at, before, and ever since the date of the covenant declared on. The court refused to let the witness testify, to which Bullock excepted, and this is

the only exception taken in the progress of the cause. The evidence thus excluded might have conduced to show that the money had not been collected from the Kirkhams, as was averred in the first count, and that it could not have been collected by reasonable diligence, as averred in the second count; but such evidence did not in the least tend to counteract the plaintiff's cause of action, as set out in the third count.

Under the first count it was the duty of the plaintiff to show that the defendant had collected the money from the Kirkhams. The *onus probandi* was with the plaintiff, and if he failed to show the collection of the money, according to his averment, he must have failed upon this count. We do not perceive how the defendant could be injured by excluding his offered proof, in regard to the first count, for its exclusion did not dispense with the necessity of proving, on the part of the plaintiff, that the defendant had collected the money; and if the defendant had collected it, whether the Kirkhams were insolvent or not, could not affect the merits of the controversy.

Under the second count the issue was formed on the question of negligence. The excluded proof could not bear upon this issue. If the defendant intended to rely on the insolvency of the Kirkhams, he should have pleaded it. It is clear that the excluded proof had no bearing on the third count and the issue formed thereon; and if it were conceded that it was legitimate under the issues formed upon the two preceding counts, yet we should be averse to setting aside the judgment, when there is nothing in the record to show that the defendant made any good defense to the third count, and when, in his plea to that count, he assumed the burden of proof. It is true he demurred to the third count, but his demurrer was properly overruled.

This count avers that the defendant held no such bond on the Kirkhams as mentioned in the covenant, and that there was no suit pending thereon in the Barren circuit court. If these averments were true the covenant was broken. The covenantor undertook that they existed, and their existence is connected by the covenant with the payment of a sum of money. If they did not exist, the plaintiff's intestate may have been deceived by the stipulation, and injured by being deceived and led into a contract predicated upon their existence, which otherwise he would not have made. A vendor covenants he hath good title when he hath not. His covenant is broken by the non-existence of title in him, and his vendee may have his action and recover damages. So in this case.

Wherefore, the judgment is affirmed, with costs and damages.

PHILIPS v. HARRISS.

[8 J. J. MARSHALL, 122.]

PLEADINGS.—Whatever is well set forth in a plea, and not controverted in the replication, is admitted to be true.

REPLEVIN IS A REMEDY COEXTENSIVE with trespass *de bonis asportatis*, and lies against an officer by a stranger to an execution, whose property has been seized under color of process.

DEFENDANT IN EXECUTION is guilty of a contempt of court, if he institutes an action of replevin to recover property levied on by virtue of the writ.

BAILEE'S POSSESSION is the bailor's.

FINDING OF A JURY AGAINST A CLAIMANT, on trial of right to property, exempts the officer levying on the same from liability for the value thereof, but does not exempt him from an action by the real owner for wrongful taking and detention or abuse of property before sale.

REPLEVIN. The facts appear from the opinion. Appeal from the Anderson circuit.

Marshall and Richardson, for appellants.

Crittenden and Triplett, contra.

By Court, UNDERWOOD, J. The appellants, as trustees for Mrs. Richardson and her children, instituted an action of replevin against the appellee. Four negroes were the subject of the controversy. Harriss relied upon the following facts, which were set out in two pleas as his defense, to wit: That the two executions were placed in his hands, he being coroner of Anderson county, against the estate of John C. Richardson; that in virtue of said executions, and while they were in full force, he levied on the slaves, in the declaration mentioned, they being in the possession of the said Richardson; that he advertised the slaves for sale, according to law, permitted them to remain with said Richardson, and took his bond, with surety, to have them forthcoming on the day of sale; that he gave the plaintiffs, who claimed the property, ten days' previous notice of the time and place of sale; that in pursuance of the act of assembly, in such cases made and provided, he summoned a jury to try the right of said slaves; that the jury were impaneled and sworn according to law; and that the claimants, to wit, the plaintiffs, did not succeed in establishing the property to be theirs, the jury not agreeing.

To the facts thus set forth in the defendant's pleas, the plaintiffs in substance replied, that they were the owners in fee of the slaves in contest, the same having been conveyed to them in trust, for the use of Mrs. Richardson, wife of said John

C. Richardson, by Samuel Arbuckle, who was seised at the date of his conveyance; and that for the purpose of effectuating the terms of the trust, they delivered the slaves, in the declaration mentioned, to said Richardson and wife, to be held by them as bailees of the plaintiffs; and that said slaves, at the time of the levy of said executions, were held and possessed by said Richardson and wife as the bailees of the plaintiffs, and not in the proper right of said Richardson as his own property. To the replications of the plaintiffs, the defendant demurred. The court gave judgment on the demurrer for the defendant, to reverse which the plaintiffs have appealed.

It is a principle in pleading, that whatever is well set forth in a plea, and not controverted in the replication, is admitted to be true. Thus all the material facts stated in the pleas in this case are admitted, and the plaintiffs attempt to avoid them by asserting title in themselves to the slaves. Two questions are made upon the record: 1. Can the owner of personal property, or a chattel, taken in execution, and who is not a defendant in the execution, maintain the action of replevin for the goods in the actual possession of the defendant in the execution, at the time of the levy made on them? and, 2. Can the officer, levying the execution, exonerate himself from a recovery in an action of replevin, by showing that he impaneled a jury to try the right of property, and that the jury failed to decide that the property belonged to the claimant?

In regard to the first question, we are of opinion that the defendant in the execution can not successfully maintain an action of replevin against the officer making the levy. The institution of the action, by the defendant in the execution, would be a contempt of the authority of the court rendering the judgment upon which the execution issued, and ought to be punished as such: See 1 Chit. 160, and the authorities there cited.

If a defendant in the execution, after judgment had been legally entered against him, upon a full and fair trial, were tolerated in bringing his action of replevin, and by it to replevy the goods taken in execution, there might be no end to the delays which the defendant might thus create. Justice and the end of the law would be effectually subdued; for, although the defendant in the execution, and plaintiff in the action of replevin, would fail upon the trial, and judgment would be rendered in favor of the officer for the restoration of the goods, yet the action might be again and again renewed, and delays, without end, effected. To prevent such abuses and such contempts

of the authority of courts, to prevent the monstrous absurdity of rendering the remedies afforded by law, with a view to redress wrongs, the means of defeating the very end to be accomplished, the defendant in an execution who should thus prevent the action of replevin, might and ought to be severely punished for contempt.

Although such should be the rule, in respect to the defendant in the execution, the reasons for it are not equally strong in relation to those whose property may be seized under executions against others. Indeed, we are of opinion that the reason entirely fails where an execution issues against A. and the officer levies on the property of B. It is a trespass on the part of the officer to seize property not owned by the defendant in the execution, and we perceive no reason founded in good policy which should prevent the real owner from maintaining his action of replevin, although some adjudged cases may be found which lean against it. Chitty, 160, lays it down in general terms, "that no replevin lies for goods taken by the sheriff by virtue of the execution, and if any person should pretend to take out a replevin, the court would commit him for a contempt," etc. But no goods can with propriety be said to be taken by virtue of the execution, unless the goods belonged to the defendant in the execution; for an execution against A. is no authority, and constitutes no justification for taking the goods of B. Where the goods are taken by virtue of the execution—that is, when the goods of the defendant in the execution are taken—we admit that it would be a contempt for any person to pretend to take out a replevin. It would be more aggravated for the friend in the execution to do it, than for the defendant to do it himself. These doctrines do not embrace the case of the goods of a stranger to the execution and judgment, who, when they are taken in good faith, resorts to the action of replevin to obtain redress. The case of *Thompson v. Button*, 14 Johns. 84; and the case of *Kerley v Hume*, 3 Monroe, 182, tolerates the opinion that a stranger to the execution may maintain his action of replevin. These cases also prove that the action of replevin is not confined to injuries resulting from illegal distresses for rent, damage feasant, and the like. That it is a remedy coextensive with that of trespass, *de bonis asportatis* is established in New York: 7 Johns. 140, 143; and 14 Id. 17; see, also, Chitty, 159. We see no reason for restricting the remedy, by action of replevin, to narrower bounds in this state. The doctrines laid down by a majority of the court, in the case of

Baldwin v. Alexander, 7 Monroe, 424,¹ and which are well fortified by authority, prove that the action of replevin is an appropriate remedy in behalf of all strangers to an execution, whose property may be seized by an officer under color of the process.

Applying the foregoing views to the facts of this case, we find nothing in them which can lead us to decide that the appellants were not entitled to maintain their action, merely because the slaves in controversy were seized by Harrias to satisfy the execution against Richardson.

We are also of opinion that the taking of the slaves from the immediate possession of Richardson, can not prevent the appellants from maintaining this action, if it be true, as they allege, that Richardson was no more than their bailee. The possession of the bailee is the possession of the bailor. The general property of a chattel commonly unites with it the possession in law, although, in fact, the thing may be actually possessed by another; thus, the horse of the farmer is in his possession, in law, although, in fact, his overseer or apprentice may be riding or working the horse in the performance of business exclusively his. The general property is sufficient to maintain the action as a general rule: Chitty, 158. It is not necessary, as contended by the appellee's counsel, to maintain the action of replevin, that the taking should be from the plaintiff in action. The taking may be from a *feme sole*, and, after marriage, the husband alone may maintain the action: Chitty, 159. It is questionable whether a mere naked bailment, for safe keeping, gives the bailee such a right as to enable him to maintain the action in case the goods are taken from him: 1 Johns. 380.

In *Crepon and others v. Stout*, 17 Johns. 116,² the plaintiffs were permitted to recover in replevin, although the goods were not in their possession when taken by the sheriff's vendee, who was defendant. If the defendant in the execution is actually possessed of property as bailee merely, say a horse, which is loaned him to ride a few miles, the horse is not subject to the execution. The sheriff must levy at his peril, and is a trespasser if he take property not liable. In general, the action of replevin can be maintained where trespass will lie: *Pargburn v. Patridge*, 7 Johns. 142 [5 Am. Dec. 250]. In *Bouldin v. Alexander*, this court intimated that a bill in chancery, to enjoin a sale of property, illegally seized by an officer, might be tolerated but for the remedy afforded by the action of replevin. If the action is

1. *Bouldin v. Alexander*, 7 T. B. Monroe, 424.

2. *Cresson v. Stout*, 17 Johns. 116 [8 Am. Dec. 373].

restricted, so that the remedy can not extend to all cases of illegal seizures, by officers, there will still remain a class of cases in which the owner of property, taken in execution contrary to law, must stand by and see it sold without power to prevent it, and be driven, at last, to his action of detinue and trover, and that possibly against an insolvent vendee of the officer, in which his remedy would be a mockery.

The answer to be given to the second question, or point, will depend on the construction of the act of 1803, concerning the trial of the right of property, taken under execution: 2 Dig. 1047. We have no doubt that the legislature contemplated cases in the enactment of that statute, in which officers might levy executions upon property not liable to be taken, because not owned by the defendants in the executions. It might frequently happen that officers would levy executions on property, the ostensible ownership of which was with the defendant in the execution, when the real ownership was with another. When the property thus levied on was claimed by one not a defendant in the execution, the officer's situation became perilous and embarrassing. If he sold the property and thereby converted it to the satisfaction of the execution, he became liable for its value, at least, to the real owner, provided it was thereafter shown that the defendant in the execution was not the real owner. If the officer surrendered the property to the claimant, when in truth it belonged to the defendant in the execution, he thereby became liable to the plaintiff in the execution for its value. To relieve him from this embarrassing and responsible situation, the statute provides for impaneling a jury to try the right of property, and declares "should the claimant not succeed in establishing the property to be his, the sheriff or other officer, as the case may be, shall sell the property, and not be liable to any suit on account of such sale."

We are of opinion that it is not necessary that the sheriff should wait until a jury is demanded by the claimant of the property, before he summons one. The claimant might never make the demand. The sheriff, or other officer, for his own safety, may summon and impanel the jury. Unless officers may do this, it would be in the power of others to render the statute, in respect to them, a dead letter, and to defeat its provisions.

When the jury is impaneled, and the claimant of the property does not succeed, what is the consequence? No more than this: The officer may then sell, and is "not liable to any suit

on account of such sale," that is, he is not responsible to the claimant for converting the property in satisfaction of the execution, although thereafter such claimant might, in the action of trespass, trover, or detinue, be enabled clearly to establish his right of property. But does the statute, in case the sale is made, where the claimant fails to establish his right of property, merge the original trespass in taking the property wrongfully in the sale, so as to protect the officer against the consequences of his trespass, as well as the consequences of converting the property in satisfying the execution? Suppose an officer holding an execution against A., levies it to-day on the horse of B., and on to-morrow B. institutes his action of trespass for the injury; suppose from any casualty, before the jury is impaneled to try the right of property, the circuit court should sit, and the suit for the trespass should be called for trial, can the officer postpone the trial until he shall have had an inquest before himself as to the right of property, so that it may be seen whether a jury will not find the horse subject to the execution, or disagree, which amounts to the same thing? If the officer can procure a postponement of the trial of the trespass suit, with that view, and the jury, on the trial of the right of property, disagree, and the horse is sold, will such a sale defeat the action of trespass? Without a clear and unequivocal declaration of the statute to that effect, we should feel great reluctance in so deciding. The cause of action, resulting from the taking, is complete before the sale is effected, and the action, in the case supposed, is instituted for the trespass before it is ascertained under the statute whether it will be the duty of the officer to make the sale or not. The language of the statute, therefore, ought to be direct, if the construction is to prevail, and the subsequent sale shall operate as a release of a good cause of action; for such must be the effect of deciding that a sale of the property, after a disagreement of the jury, exonerates the sheriff, or other officer, from damages on account of the wrongful taking.

There are no words in the statute which will justify this construction; and it can not prevail unless it be essential that it should, in order to secure to the officer the exemption from suit *on account of the sale*. It may be contended that an officer could never effect a sale under execution unless he was permitted to take the property which is to be the subject of the sale; and that, whatever will protect him in making the sale, must necessarily protect him in the use of all the means proper to accom-

plish the object to be effected, to wit, the sale. We acknowledge that there is much force in this reasoning, but we believe that a proper discrimination between the means to be used and the end to be accomplished, will present the subject in such a point of view as to leave but little difficulty. The legislature has said to the executive officers, if you take the property of B. under an execution against A., and B. can not establish his right, or will not, to the satisfaction of a jury, and you then sell it, you shall not be sued for the sale; that is, as we understand the statute, the officer is not to be liable for the value of the property converted by the sale.

But is this equivalent to saying, also, that the officer shall not be liable for the illegal taking and detention up to the time of the sale? We think it is not. If, instead of selling the property, the officer returns it to the real owner, the defendant in the execution having paid the debt, are no damages to be awarded for the illegal taking and detention? Is the officer to be excused because he would have sold if the debt had not been settled, and because, in case he had sold, he would then have been exonerated? This would be giving great lengths. It would not only be exonerating officers from liability, on *account of sales* actually made, but it would screen them where they might have been made had nothing turned up to supersede them. If the officer restores the property to the rightful owner, and he sues for the wrongful taking and detention, can he recover the value of the property? He can not; because that has been restored to him. He can only recover for the detention, and smart money for the wrong in taking and the value of any injury the property may have sustained. If the property is never returned but converted, all this, and the value of the property in addition, may be recovered.

Now, where the statute says the officer shall not be liable to suit for the sale, we believe it means no more than to exonerate him from paying the value of the property converted by that sale, and that it can not be construed to deprive the real owner of the property from recovering for other injuries, distinct in their character and nature. The real owner, by the detention of his horse or his slave, is deprived of their labor. This is an injury to him. Who is to compensate him for it? The plaintiff and defendant in the execution may be altogether ignorant of the levy. They can not be made to pay it. The officer alone must pay it, or there is no remedy. Suppose the officer abuses the property before the day of sale, by which it is less valuable

and sells for less than otherwise it would have done, will the sale excuse him from liability for the damages thus done to the real owner? We think it will not; if it does, there is no remedy. We put these cases to show that there are injuries, which the real owner of property may sustain by the conduct of the officer, distinct from that inflicted by the sale; and that there is great propriety in limiting the protection afforded by the statute to that arising from the sale alone, to wit: the conversion of the property, whereby the owner apparently sustains a loss equal to its value when sold. We say apparently, because the owner is allowed to sue the purchaser, and may recover it in detinue or its value in trover.

Limiting the protection afforded by the statute in the manner we have done, the real owner's redress, although against several, is coextensive with his injury. If he pursues the officer, with a view to render him liable for the whole, and the statute affords the protection we recognize, the officer can avail himself of it to lessen the damages for the value of the property converted by the sale, and this will, in the language of the statute, be rendering him "not liable to suit on account of such sale;" and if there be no other injury to the real owner than that arising from the sale, the officer will succeed in the action to the cost of his adversary. These principles, it seems to us, give the proper application and construction of the statute of 1803; and will avoid the mischiefs which seem to be so much dreaded by the counsel for the appellants, as likely to arise from extending the protection of the statute, so as to excuse an officer from trespass when he might be instrumental, by means of a packed jury, in laying the foundation upon which his excuse must rest. According to our view, an officer, by the trespass, will at least subject himself to nominal damages, and can in no case find protection under the statute beyond the value of the property sold. To that extent he shall have credit, but no further.

It results from the foregoing reasoning that an officer can not, by the finding of the jury upon a trial of the rights of property taken by him under execution, justify a trespass, or plead such finding in bar of an action of trespass for his illegal seizure of the property. It equally follows that the verdict of such a jury can not be pleaded in bar to an action of replevin. Harriss, the coroner, is not sued for a sale of the property, for no sale has yet taken place; the thing, therefore, has not yet happened in which he is protected by the statute when it shall occur. The action of replevin has put a stop to the sale, and if the appel-

lants succeed, the appellee will never be permitted to make it; and hence, as in such an event he will not have inflicted any injury by making the sale, the statute has nothing to operate upon in protecting him on account of a sale. If the plaintiffs succeed, their judgment will be for such damages as the jury may assess for the taking and unjust detention of the slaves, and costs. If the defendant succeeds, he will be entitled to judgment for the restoration of the slaves, and his costs; and then he may proceed to sell them, which being done, he will be protected by the statute from suits on account of the sale. The action of replevin has arrested the officer in his progress like an injunction would have done.

We can not discover anything in the finding of the jury, as pleaded, and which is admitted by the replevin, that constitutes a bar to the plaintiff's action. The pleas do not aver that the slaves were the property of John C. Richardson, the defendant in the execution; and for the want of such an averment, we consider them radically defective, since the finding of the jury, on the trial of the right of property, constitutes no bar. The court, therefore, erred in giving judgment upon the demurrer to the replications in favor of the defendant.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded with instructions to permit the defendant to amend his pleas, if he asks leave to do so, and to progress with the cause in conformity hereto; and if he does not amend, then to render judgment upon the demurrer in favor of the plaintiffs.

The appellants must recover their costs.

REPLEVIN OF PROPERTY WRONGFULLY LEVIED UPON.—After some conflict in the authorities, it seems now to be well settled that the property of a stranger to the writ can not be placed in *custodia legis* by a levy thereon by virtue of such writ: See the note to *Kellogg v. Churchill*, 9 Am. Dec. 105, and the authorities there cited.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

BAILEY v. TAYLOR.

[8 MARTIN, N. S. 124.]

FORCIBLE OUSTER.—A person who is in possession of property of the United States can not be forcibly ousted therefrom by order of a surveyor of customs.

APPEAL from the first district. The opinion states the case.

Preston, for the plaintiff.

Maybin, for the defendant.

By Court, PORTER, J. The petitioner, while in the service of the United States as inspector of the customs, built a house on property belonging to them. The defendant took forcible possession of the house and refuses to deliver it up. This action is brought to recover possession of it, and damages for the illegal entry and detention. The defense set up is that the land on which the building was erected belongs to the general government, and that the defendant was ordered to take possession by the surveyor of the customs. The court of the first instance thought this defense untenable, gave judgment in favor of the plaintiff for one hundred and eighty dollars, and ordered the plaintiff to be put in possession. From this judgment the plaintiff has appealed.

We think the judgment rendered below must be confirmed. We know of no law which authorizes a surveyor of the customs to direct a forcible entry and ouster of possession of the United States property. If the defendant held wrongfully there were legal means of evicting him.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed with costs.

BRAND v. DAUNOY.

[8 MARTIN, N. S. 159.]

INCONSISTENT DESCRIPTION IN DEED.—A grantee is entitled to the land up to the point called for in his deed, although the distance given does not reach to that point.

APPEAL from the first district. The opinion states the case.

Watts, for the plaintiff.

Pearce, for the defendant.

By Court, PORTER, J. The petitioner sold to the defendant a lot of ground, with buildings erected on it. The matter in dispute between the parties grows out of the sale, and relates to a passage of three feet in front on the street, with fifty in depth, adjoining the lot. The defendant insists it made a part of the property purchased by her from the plaintiffs. He contends it was not included in the conveyance. The court of the first instance gave judgment against the petitioner, and he appealed.

In the act of sale, the property is described as being that which the plaintiff purchased from John McDonogh, containing twenty-two feet six inches in front, with one hundred and ten in depth, bounded on one side by property belonging to Manuel Andry, and on the other by a lot of the vendor. This passage is only fifty feet in depth, and there is land enough, independent of it, to supply the number of feet which the deed declares the lot to contain. So far the facts support the plaintiff's pretensions; but the description of the boundaries is inconsistent with them; for if the three feet were retained by him, then the lot was not, as the conveyance states, bounded on one side by property of Andry, and on the other by the vendor's. The limits on each side would have been land of the seller; or rather it would have been bounded on one side, to the depth of fifty feet, by land of the petitioner's, and on the remaining portion of one hundred and ten feet, its limit would have been the property of Andry.

With this uncertainty in regard to the boundaries, we think the court did not err in admitting parol evidence. The ambiguity was latent, and arose from matters without the instrument. The evidence proves satisfactorily that the passage now sued for entered into the views of the parties at the time the contract was made. We think the court below did not err in deciding against the plaintiff.

There are two bills of exceptions taken by the plaintiff. The

first relates to the permission given by the court to the appellee to prove title, when she had not pleaded it in her answer. On referring to the answer we find it does aver the defendant to be the owner of the premises sued for. It would have been more regular if the answer had stated under what title the defendant derived her right; but, as we cannot believe the plaintiff was surprised by the production of his own deed, we see no reason for remanding the cause, more particularly as no application was made for a new trial on that ground in the court below. The second goes to the refusal to permit the clerk of the notary to testify that he went to another notary's office to examine the sale from McDonogh to Brand, and took a note of the title and boundaries, for the purpose of drawing the deed from the plaintiff to defendant. The proof was objected to, as irrelevant, and we think correctly. We are unable to perceive what effect it could have on the case.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed, with costs.

In *Bryas v. Beckley*, 12 Am. Dec. 276, it was decided that, where it is necessary to depart either from the courses or the distances in a deed, the distances ought to yield; to the same point see also *Dale v. Smith*, Id. 64, and note 70; *Bradford v. Hill*, 1 Am. Dec. 546, note 548.

MILES v. ODEN.

[8 MARTIN, N. S. 214.]

CONTRACTS ARE GOVERNED BY THE LAWS OF THE STATE WHERE MADE; and by the comity of nations, rights acquired under them are not diminished by the parties passing into other states; provided no injury result to the inhabitants of the country whose aid is required to enforce such rights.

LIENS ON LANDS AND SLAVES REMAINING IN POSSESSION OF THE OWNER have, against third persons, no effect in this state, unless duly recorded; and this rule applies equally to inhabitants of another country who come here to enforce liens given by the laws of the place whence the property is brought.

CREDITOR WHO AGREES TO RECEIVE IN DISCHARGE OF HIS DEBT the proceeds of property which he permits an agent to take out of the state to be sold, can not attack the sale made by such agent, on the ground that the latter did not return to him the proceeds thereof.

AGENT MAY SELL NOTE TAKEN BY HIM IN PAYMENT for property which he had authority to sell; and the purchaser of such note can not be deprived of it without repayment of what he gave for it,

BONA FIDE PURCHASER IS NOT AFFECTED BY FRAUD IN HIS VENDOR, where the latter has the legal title to the property sold.

MAKER OF NOTE WILL NOT BE COMPELLED TO PAY INTEREST, where, owing to contest between adverse parties, it is uncertain whom he ought to pay; until such contest is decided he is not *in mora*.

APPEAL from the fifth district. The opinion states the case.

Brownson, for the plaintiff.

Simon, for the defendants.

Bowen, for the intervenor.

By Court, PORTER, J. The petitioner states, that he obtained a judgment against one Oden, in the state of Kentucky, on which judgment an execution issued, that was levied on property that was afterwards replevied under the laws of Kentucky, by the said Oden, he giving his bond with a certain O. G. Waggoner as his security. That on the seventh of June, 1820, Oden executed to Waggoner a mortgage upon the articles seized, among which were certain slaves. That the debt due to the petitioner is yet unpaid, and that in virtue of the seizure made under the execution in Kentucky, and the assignment from Waggoner, the petitioner has a lien on the property levied on. That one Miller, of the state of Kentucky, has fraudulently caused the said property to be transported from the state of Kentucky to defraud the mortgagee, and has sold it to one Brent. That Miller's title, if he had any, is subordinate to his; that the proceeds of the property sold, were in fact due to Oden; Miller having lent his name to defraud the petitioner: The petition concludes with a prayer that Brent may be decreed to surrender up the negroes or pay the price due for them to the plaintiff; and that an attachment may issue against Oden and Waggoner.

The attachment issued and was levied on the debt due by Brent. Brent, who was thus made both defendant and garnishee, filed an answer in which he stated: First, That he bought the negroes from a certain Morris L. Miller, in good faith, without any notice or knowledge of the plaintiff's claim; and if the said title should hereafter be declared fraudulent against Oden's creditors it can not affect his rights, as he purchased in this state without knowledge of these transactions. That the negroes purchased by him only formed a part of the property mortgaged to Waggoner, and that the plaintiffs must discuss the other portion of it in the state of Kentucky, before he can have recourse on that sold to the respondent. That the negroes were purchased by Miller at a sale made under an execution in favor of William Fletcher, and that admitting this sale

to be fraudulent, it can not affect the respondent's title, who bought without notice. That one of the slaves is affected with redhibitory defects, and the price of this slave must be deducted from the sum due. That on the twenty-first of April, he received a notice from L. and M. Commagere, who stated themselves the holders of the note which the respondent gave to Miller, for the slaves now claimed by the petitioner, in which notice they demand payment for the same.

Brent's answers to interrogatories given on oath, do not state that funds of the defendants were in his hands, but acknowledges a note to have been given for the slaves mentioned in the petition, on which a deduction should be made of four hundred dollars or four hundred and fifty dollars, the price of one of the slaves, so affected with redhibitory diseases as not to be of any value. On filing this answer the plaintiff prayed liberty to amend his petition, by making Miller, who sold to Brent, a party to the suit. In this amendment judgment is asked against Miller, so far as to have the sale, made by him to Brent, canceled and set aside, and the demand is reiterated that the negroes be seized and sold to satisfy the claim of the petitioner, or that there be judgment against Oden and Waggoner for the price of the negroes sold to Brent.

The court ordered Miller and Commagere to be made parties to the suit.

At this stage of the proceedings Raspalier intervened, and averred that he had purchased the note the defendant, Brent, had given for the slaves. That Miller's title to the property was *bona fide*. The petition of intervention concluded by demanding that he might be decreed to be the only person entitled to receive the amount of said note, with interest, and that judgment should be rendered in his favor against Brent. Miller answered by denying any knowledge of Miles having such a claim as that set up in the petition, and requiring him to furnish proof of it. That Miles' mortgage is inferior to the title which the respondent acquired, because a long time previous to the date of the mortgage to Waggoner, Oden executed a deed of trust to Harrison Blanton, the said deed of trust being for the purpose of securing Robert P. Letcher and others against damage and loss, as securities for Oden. That Letcher commenced suit, recovered judgment, and issued execution against Oden. That the respondent bought the slaves at the sale made in virtue of such execution; and that he did not send them out of the state of Kentucky to defraud the petitioner. The answer

further states, that the respondent, being unwilling to speculate on the misfortunes of Oden, directed the proceeds of the sale of the slaves sent by him to Louisiana to be paid over to Oden's creditors.

The respondent also states, that Letcher has assigned to him the mortgage under which the slaves were sold; that Waggoner, under the mortgage, in virtue of which the petitioner claims, directed the execution at the suit of Letcher to be levied on the property which the respondent purchased; and finally that the petitioner had ratified and approved the sale.

Brent amended his answer, by stating that the title under which Miller had sold the negroes, had been declared fraudulent, and pronounced null by a court of equity, in Kentucky. That he believed the sale had been made with an intention to deceive him, and that he is threatened with many suits for the property. Miller and Raspalier objected to this answer being filed, but the court received it.

The next change we find in the pleadings, is that made by the plaintiff, amending the petition, and especially stating the facts attending the suit in Kentucky, which, he averred, terminated by a decree annulling the sale to Miller. The suit of Raspalier against Brent was consolidated with that in which the proceedings have been just stated, and on the consolidation being made, Brent filed another amended answer, in which, repeating all the facts already stated, he prayed that the sale might be annulled and avoided, it being fraudulent on the part of Miller. Miller denied the allegation of Brent, and averred there was collusion between him and Miles, the plaintiff, to cheat and defraud Raspalier. Raspalier also amended the pleadings on his part by repeating, or nearly so, the allegations of Miller.

On these pleadings the parties went to trial, and judgment was rendered in favor of the intervenor. An appeal was taken to this court; the judgment was reversed, and the cause remanded, it appearing to have been tried without any answer having been put in on behalf of the defendant in attachment: Vol. 6, 211. On the return of the case to the district court, the pleadings were so amended as to present the *contestatio litis* between all the parties. Another trial was had which terminated as the first, by judgment being rendered in favor of Raspalier, the interpleader. From this judgment Miles, the plaintiff, and Brent have appealed.

The plaintiff has placed his right to recover before this court on two principal grounds. 1. That he had a lien on the prop-

erty in Kentucky, which he has a right to enforce here. 2. That the money due by Brent for the negroes purchased from Miller, was in fact due by Oden and Waggoner, and that as such his attachment levied on it, previous to any notification by Raspalier of his assignment, entitles him to judgment.

1. On the first ground, we are of opinion that the lien which the plaintiffs might have had in Kentucky, can not affect a *bona fide* purchaser in this state. The court are aware of the common principle, that contracts are governed by the laws of the country in which they are passed; and that, by the comity of nations, the rights flowing from them are not diminished by the parties passing into other states; provided, the laws of that state afford adequate remedies to enforce the obligation. But this principle is subject to the exception, that in carrying them into effect, no injury result to the inhabitants of the country whose aid is required to enforce them. We had occasion to express our views fully on this subject, in the case of *Saul v. His creditors*, 5 Mar. N. S. 569 [16 Am. Dec. 212]; and it is unnecessary to repeat here the reasoning on which we considered the limitation of the general principle to rest.

Our legislature have declared, that liens on land and slaves remaining in the possession of the owner, should not have effect against third persons, unless duly recorded. This rule was doubtless established to avoid the inconvenience and injury which parties, buying without notice of these liens, would sustain. Every reason, which supposes the necessity of such a regulation, as between our own citizens, applies with equal, if not greater force, to the inhabitants of another country, who come here to enforce liens given by the laws of the place whence the property is brought.

Huberus, whose authority on this subject is justly entitled to great attention, after giving the limitation above noticed to the general rule, presents nearly this case as an example of it; and states that a mortgage, good on personal property in one country, can not be carried into effect in another state, whose laws do not recognize such hypothecations. If this be true, where mortgages of this description are not recognized as having any legal effect, we think the same rule should apply where they are only permitted against third persons on certain conditions, such as registry, etc. This writer, indeed, gives the case of a marriage contract, binding on creditors in one country without being enregistered, as not being so, if the parties remove into another, where publicity is required to be given to them by

recording. His language in relation to mortgages is as follows: "*Hypotheca conventionalis in re mobili dat jus pœlationis etiam tertium possessorem jure Cæsaris et in Frisia non apud Batavos. Proinde si quis ex ejusmodi hypotheca in Hollandia agat adversus tertium non audietur. Quia jus illi tertio in ista re mobili quæsitum per jus alieni territorii non potest auferri.*" In the translation given of this passage in 3 Dallas, the sense is somewhat obscured by the omission to state in what country the mortgage would not have its effect: Huberus de Conflictu Legum, lib. 1, tit. 3, No. 11; 3 Dallas, 375, *in notis*.

2. This point disposed of, the right of the plaintiff to recover must rest on the strength of his pretensions to attach the debt due by Brent, as belonging to his debtors, Oden and Waggoner. Oden, who was a citizen and resident of Kentucky, was indebted to a larger amount than he was able to pay. He was pressed by some of his creditors, among others, by the plaintiff in this suit. To avoid this sacrifice of his property, he procured an execution to issue at the suit of one of them, under which several of his slaves were seized and sold, and Miller became the purchaser. It is shown clearly that Miller's object in buying was to assist Oden, and enable him to dispose of his property without too great a loss; that he had no intention of profiting by it. In pursuance of this object, the slaves purchased were sent down the river, and sold to Brent, with the intention of applying the proceeds to the payment of the creditors in Kentucky. The plaintiff has attacked this act as fraudulent; insists that by the laws of Kentucky it was null and void, and contends that the money due by Brent being due in reality to Oden, he had a right to attach it as the creditor of Oden.

The real character of the transaction, and its legal effect, according to the laws of Kentucky, have been the subject of most elaborate discussion at the bar. We do not find it necessary to go into the question. It is shown that after the slaves were sent down the river, and before they were sold, Miles, the present plaintiff, Letcher, another creditor of Oden, and Oden, entered into an agreement, by which, among other things, Miles consented and agreed to receive, in discharge of this debt, the proceeds of the slaves sent down the river by Miller, who, it is stated in the act, was the trustee of Oden. We are of opinion that the plaintiff, by his agreement, is precluded from saying the sale of the slaves was null and void; by consenting to take the proceeds of the sale, he sanctioned, as far as he could, the legality of the sale. It has been, indeed, con-

tended that by virtue of the stipulations in the instrument Miles did not intend to waive any of his rights in case the money was not paid to him. But the most attentive consideration of the agreement has failed to produce that conviction on our minds. It appears to us that the reservations there made relate to the property still remaining in Kentucky. And that there is nothing in it which would authorize us to say it was the intention of the parties that the plaintiff should retain the right to attack the sale as fraudulent, in case he could not obtain the proceeds of it.

But there is another ground on which the plaintiff insists the attachment was properly levied. Miller, he says, was the trustee of Oden, and the debt due to him being for the benefit of the *cestui que trust*, as a creditor of the latter, he had a right to attach it. To this position the court assents; but his right to attach the equitable interest which Oden had in the funds can not, in our opinion, defeat a right which a third party had acquired from Miller who had sold the negroes, and to whom the note given for them was made payable, and in whom, consequently, the legal title was vested. This is the position in which Raspalier, the intervenor, is placed. He acquired *bona fide* from Miller. The note was, it is true, not negotiable, but it was a proper subject of sale; and although liable to all the equity existing between Miller, the payee, and Brent, the maker, those persons who had intrusted Miller with the property vested in him the legal title, and put him in a situation to hold himself out to the world as owner of the property, can not deprive the purchaser of his rights without repaying to him the money which, as a consequence of the confidence reposed in the payee, he advanced. It is clear that Oden could not do so. His creditors can not have greater rights, apart from the question of fraud, which is considered as waived by the agreement of the plaintiff to be paid out of the proceeds of the sale. We are unable to distinguish between the right of the purchaser of the property and the rights of that which the vendor obtained in lieu of it, whether it was a note or any other object.

Brent, in his amended answer, has prayed a rescission of the sale, on the ground that he has not acquired a good title; but we do not see any danger to which he is exposed on this score that would authorize us to declare the contract void. We understand it to be a clear principle of the common law, under which this transaction took place, that a *bona fide* purchaser is not affected by fraud in his vendor, who has a legal title to the property sold: 6 Cranch, 133.

The court below gave interest on the note, and in this we think it erred. There was one party claiming a lien on the slaves and a right to the proceeds, as belonging to Oden and Waggoner; the other demanded the proceeds, in virtue of an assignment from Miller. This was such a disturbance in the title as well authorized Brent to refuse paying either. Placed in so much uncertainty as to whom he was to pay, he could not be considered *in mora*. The court decided correctly in deducting the price of the negro Charles, who had died, but the judgment must be reversed on account of the error in allowing interest.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed. And it is further ordered, adjudged, and decreed, that the intervenor, C. Raspalier, do recover against William L. Brent, the sum of two thousand three hundred and fifty dollars, and that the plaintiff, Charles Miles, pay all the costs of the proceedings, except those of appeal, which are to be paid by the intervenor and appellee.

Contracts must be construed and their validity determined by the law of the place where they were made: *Lynch v. Postlethwaite*, 12 Am. Dec. 494, note 504; *Greenwood v. Curtis*, 4 Id. 145. But if the parties intended that a contract should be executed elsewhere, it is to be governed by the law of the place where it is to be executed: *Smith v. Smith*, 3 Id. 410; *Warder v. Arell*, 1 Id. 488. And no nation or state will, to its own injury, enforce contracts made elsewhere, nor when they are prohibited by the provisions of its own positive laws: *Saul v. His creditors*, 16 Id. 212, and note 231. As to when interest will be allowed and when not, see note to *Selleck v. French*, 6 Id. 188.

REELS v. KNIGHT.

[8 MARTIN, N. S. 257.]

FRAUDULENT SALE OF LAND.—The conduct of parties to a sale, before and after, as well as at the time of a sale, may be inquired into for the purpose of ascertaining whether or not such sale was *bona fide*.

APPEAL from the fifth district. The opinion states the case.

Brownson, for the plaintiff.

Plaisted, for the defendant.

By Court, PORTER, J. This is an action by one of the forced heirs of C. Horner against her brother, the defendant, to set aside a conveyance made to him by their mother a short time previous to her decease. The cause was submitted to a jury in

the court of the first instance, who found a verdict by which they declared the conveyance to be fraudulent. No application was made for a new trial, the court confirmed the verdict by its judgment, and the defendant appealed.

On the trial, the plaintiff offered evidence of the acts of the defendant subsequent to the sale to show the fraudulent intent of the contract between him and his mother. This testimony was objected to, on the ground that the character of the sale must be ascertained by the intentions of the parties, coupled with their acts, at the time it was entered into, and not by what took place afterwards. The judge received the proof, and, in our opinion, correctly. A sale *bona fide* in itself at the period it was made could not, it is true, become void by fraudulent conduct in the parties to it afterwards. But when the inquiry is whether it was *bona fide* or not, the whole conduct of the party, both before and after, as well as at the time the contract was entered into, may be properly inquired into, for the purpose of ascertaining its true character. Express evidence of fraud can be rarely given. It has to be gathered from a variety of circumstances, and the detection of it would be greatly impeded by such a limitation as the defendant contends for.

We have looked into the evidence, and see nothing in it which could authorize us to set aside the verdict of the jury.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be affirmed with costs.

It was held in *Martin v. Reeves*, 15 Am. Dec. 154, that the acts and declarations of a vendor after a sale, though not in the presence of the vendee, are admissible to show fraud in the former, but not to show fraud in the latter. See, also, *Bridge v. Eggleston*, 7 Id. 209; and *Gruder v. Bowles*, 2 Id. 665.

HEIRS OF BALLIO v. POISSET.

[8 MARTIN, N. S. 336.]

SALE MADE UNDER LEVY ON PROPERTY NOT BELONGING TO THE DEFENDANT in execution, confers no right on the purchaser.

SURVIVING HUSBAND WHO IS INDEBTED TO THE COMMUNITY can not take from it until he has paid the debt, unless his share amounts to more than he owes.

APPEAL from the sixth district. The opinion states the case.

Boyce, for the plaintiffs.

Dunn, for the defendant.

By Court, MATHEWS, J. This suit is brought against the defendant as debtor to the plaintiffs, on account of property by him purchased at the sale of the succession of their mother. He pleaded a general denial, and set up as matter of defense that the debt which he owed was seized in execution on a judgment obtained by A. L. Deblieux, as the property of Marcel De Loto, the father of the petitioners, was sold, and purchased by the plaintiff in that suit, to whom he paid the sum now claimed. The plaintiffs in the court below obtained judgment, and the defendant appealed. The evidence of the cause and admission of counsel show that after the death of Marie Ballio, wife of De Loto, the property of the community which subsisted between them was sold at private sale, and that the debt claimed from the defendant was created by a purchase of part of that property. This sale took place in 1825. In 1827, a partition was made between the heirs of the mother and their father. By the procedures in that case it appears that the father was largely indebted to the community. It is also shown that De Loto is insolvent.

We assume it as undeniable that the seizing creditor of his rights can be considered as in no better situation in relation to those rights and credits than De Loto himself was; and if he owed to the community, he could not take from it until he should have paid that debt, unless his share amounted to more than he owed. Now, so far from this being his situation, it appears that a balance still remains against him after compensation by the whole amount of claims on the community. He, therefore, had no just pretension to any part of it, and consequently none of it could be legally seized and sold to pay his private debts.

In relation to the exception taken to the opinion of the judge *a quo*, by which he refused to delay the cause, in order to allow the defendant to cite Deblieux, in warranty, we think there was no error committed. If the seizure was illegal, as being on property not belonging to the defendant in execution, a sale under it could give no right to the purchaser. In the present case the debtor paid in his own wrong to a person who had no legal right to receive payment, and who may possibly be responsible to the former, not in warranty, but in an action suited to the particular cases, which can have no connection with the claims of the present plaintiffs.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs in both courts.

THOMAS v. MEAD.

[8 MARTIN, N. S. 341.]

BONA FIDE PURCHASER FOR FULL CONSIDERATION, WITHOUT NOTICE, can not be affected by a fraud committed in a transaction to which he was not a party.

APPEAL from the sixth district. The opinion states the case.

Thomas, for the plaintiff.

Flint and Boyce, for the defendant.

By Court, MARTIN, J. The plaintiff, curator of the estate of Thomas Harman, deceased, claims two negroes in the defendant's possession as part of the estate. The defendant pleaded the general issue and title in himself. The plaintiff, now, by leave of the court, amended his petition, alleging that the sale to the defendant's vendor and the defendant was fraudulent, illegal, and void. There was a bill of exceptions to the opinion of the court allowing the filing of the amended petition; so that it was properly admitted, it did not change, as is alleged, the nature of the action, and was called for by the nature of the defense. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Admitting that the conveyance from Thomas Harman to his children was fraudulent, or made to defraud his creditors, and, therefore, voidable, the defendant was a *bona fide* purchaser, and can not be affected by a fraud committed in a transaction to which he was not a party. He purchased from a person having an apparently legal right, and paid a full consideration. If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside between the parties, but the rights of third persons who are purchasers without notice will not be disregarded: *Fletcher v. Peck*, 6 Cranch, 133.

Titles which according to every legal test are perfect, are acquired with a confidence which is improved by the opinion that the party is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect can not be set up against him: *Id.* And the decision of the supreme court of the United States was unanimously given that an estate having passed into the hands of a purchaser for a valuable consideration, without notice, his title could not be affected by any fraud in the conveyance by

which his vendee had acquired his title. In the present case, the defendant acquired his title fairly, for a valuable consideration, without notice of any fraud in his vendor's conveyance; he, therefore, cannot be disturbed.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be annulled, avoided, and reversed; but, as the conveyance to the present defendant is urged not to be an absolute one, and the right of his vendor may, in case of fraud, be in the latter claimed by the plaintiff, it is ordered that there be judgment for the defendant, as in case of a nonsuit, with costs in both courts.

A *bona fide* purchaser without notice of any fraudulent design, will be protected under the statute of frauds: *Garland v. Rives*, 15 Am. Dec. 756. As to who are *bona fide* purchasers, see *Jewett v. Palmer*, 11 Id. 401.

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CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

WARREN v. PIERCE.

[6 GREENLEAF, 9.]

LOTS OF LAND IN EACH RANGE OF A NEW TOWNSHIP, numbered in regular arithmetical series, are presumed to have been located contiguous to each other; the lot numbered eight in such a series is presumed to include all the land lying between those numbered seven and nine, and a party claiming a different location must repel this presumption by positive proof.

TRESPASS *quare clausum fregit* tried on the general issue. The plaintiffs proved title to the lot numbered eight in Baldwin. The location of lots seven and nine was proved. The proprietors had ordered the lots to be laid out as nearly as practicable in one hundred acre lots, but some of the lots did not exceed eighty, while others contained one hundred and twenty acres. The space between lots seven and nine contained two hundred acres. The defendant claimed title to one hundred acres of this amount under a grant from the proprietors. The original plan of the township was lost. The judge instructed the jury to presume that lot eight extended from seven to nine, and that the burden of proof to show the contrary was upon the defendant. The jury found for the plaintiffs.

Longfellow and Greenleaf, for the defendant, contended that the presumption was that the lots were laid off in one hundred acre lots, in conformity with the order of the proprietors, and that the burden of proof to show a different location was upon the plaintiffs: *Williams v. The East India Co.*, 3 East, 192.

Emery, Shepley and Deblois, for the plaintiffs.

By Court, WESTON, J. It is the well-known practice of proprietors of townships in this state to have them surveyed and laid out in ranges and lots, causing both to be numbered in regular sequence. They then sell by the number of the lot and the range, without a more particular description. And the purchaser is entitled to his lot according to its actual location, as made by the survey, if that can be ascertained; if not, it is to be located from the plan by actual admeasurement. The plaintiffs are the owners of number eight in the first range east in Baldwin. The plan of the town is lost. There is no question about the range lines between which number eight lies.

The plaintiffs show where numbers seven and nine are; and these lots are located beyond controversy. The judge instructed the jury that number eight must be presumed to extend from seven to nine, and that the burden of proof was upon the party interested to show a different location to do so by satisfactory evidence. He would have been justified in using stronger language, and in stating that eight did and must extend from seven to nine, unless a different original location could be shown. The burden of proof is doubtless upon the plaintiffs to make out their case; but when they show the range lines between which their lot is bounded, and the side lines of the lots next below and next above theirs in number, they have located their lot and made out their case, if it be not successfully controverted by opposing testimony. The proprietors voted, it seems, to lay out their town in one hundred acre lots. But it is of no consequence what they proposed or intended to do, and the question is, what have they done by their surveyors, or other agents duly authorized. Their intention, as manifested by their vote, was very inaccurately executed; some of the lots exceeding the quantity, which is not unusual, from the liberal admeasurement formerly made, and some falling short of the number of acres proposed, which has less frequently happened.

It is conceded that eight ought to adjoin seven, because the surveyor must have begun at one and progressed onwards; but it is urged that it would not conclusively follow that it would extend to nine, especially in the present instance, where the plaintiffs claim two hundred acres, instead of one hundred, to which, it is insisted, their lot should be restricted, and that it ought rather to be presumed that the surveyor dropped or omitted a lot in his numbering. But it must be considered that there is precisely the same reason for presuming that nine

adjoins eight as that eight adjoins seven. The line, therefore, adjoining seven is no better established than that which adjoins nine. If the defendant could have shown original corners, or a line dividing the space between seven and nine, the case would have been differently presented. But the burden of proof was upon him to do this, and as he failed to do it, eight must be located as it stands numerically, adjoining seven on one side and nine on the other. Selling, as the proprietors do, by the number of the lot and of the range, the range and lot lines are referred to as monuments, and when found, will govern and control courses, distances, and quantities.

Judgment on the verdict.

MILLEN, C. J., not sitting.

HAWKS v. BAKER.

[6 GREENLEAF, 72.]

TESTIMONY OF WITNESS WHO, FROM INADVERTENCY, WAS NOT SWORN, before testifying in the cause, is wholly illegal and inadmissible in evidence, although the witness, at the time of giving such testimony, believed that he had been duly sworn.

VERDICT RENDERED UPON SUCH TESTIMONY will be set aside.

MOTION to set aside verdict. On the trial, one Leonard, being called as a witness, failed to come forward and be sworn with the other witnesses. Plaintiff, supposing him to have been sworn, called and examined him as a witness, and the defendant cross-examined him. The witness himself supposed that he had been sworn, and remained in that belief until his evidence was all given. Neither the parties nor their counsel knew of the omission until after the verdict, which was for the plaintiff. The witness made affidavit that his statement to the jury was true.

Deblois, for the plaintiff, contended that the defendant had all the hold on the witness' conscience that he could have had, had he been sworn, since the witness himself believed that he had been sworn. The objection should have been taken at the trial, and not having been so taken must be considered as waived: *Turner v. Peate*, 1 T. R. 717; *Runn. Eject.* 397; *Commonwealth v. Green*, 17 Mass. 514; *Ford v. Tilley*, Salk. 653; *King v. Burdett*, Id. 645; *Amherst v. Hadley*, 1 Pick. 38; *Waite v. Maxwell*, 5 Pick. 217 [16 Am. Dec. 391]; *House v. Low*, 2 Johns. 378; *Callender v. Marsh*, 1 Pick. 418; 7 Cranch, 290; *Hollingworth v. Duane*, 4

Dal. 354; 6 Bac. Abr. 660, Trial; *L. Claxton's case*, 12 Mod. 567; *Vernon v. Hawkey*, 2 T. R. 120; 6 Dane's Abr. 249, sec. 8; *Robinson v. Cook*, 6 Taunt. 335; *Gist v. Mason*, 1 T. R. 84; *Bond v. Cutler*, 7 Mass. 205; *Walker v. Green*, 3 Greenl. 215; *Keen v. Sprague*, 3 Id. 77. It is not material whether the defendant knew of the omission or not. The defendant is bound by his cross-examination.

Longfellow and Eveleth, for the defendant.

By Court, MELLIN, C. J. The facts on which the motion for a new trial are founded are certainly peculiar, and we have not found any case very nearly resembling it. Under the circumstances, disclosed in the report, ought a new trial to be granted? Motions of this kind are addressed to the discretion of the court, and for that very reason it is often difficult to decide them on account of those doubts which exist as to the course which a sound discretion seems to require us to pursue. It is a well settled principle of law that no evidence can be permitted to go to the jury, unless under oath, without express or implied consent. This principle is recognized and stated in the case of *Ross v. Gould*, 5 Greenl. 204. In this case it is proved that there was no consent; so that the statements of Leonard, which were received by the jury as evidence, were wholly improper and illegal. Shall the verdict be set aside, merely that on another trial Leonard may be sworn, and then testify to those facts which a former jury have probably believed, though he stated them when not on oath? It is the duty of the counsel offering a witness, to move that he may be sworn, and thus be qualified to testify. It is then the duty of the court to cause the oath to be administered to him, if no legal objection appears to his competency. Thus far the counsel for the opposite party has no concern with the transaction; he has a right to presume that the person taking the stand in the character of a witness has been duly sworn. Of course his omission to inquire and ascertain the fact can not be considered as any waiver of his right to object to the incorrectness of the proceeding, if the person supposed to be sworn was in fact never sworn. No man can be considered as waiving a right which he is unconscious of possessing; the supposition is as unreasonable as it is inconsistent with good sense. Presumption is good till the contrary appears on proof. This is a legal maxim. But proof flatly contradicting presumption destroys it. In the case at bar there is such proof. The defendant has not had a trial of his cause on legal evidence, but

partly on that which is illegal. And, according to the facts, this was not owing to any fault on his part, but the plaintiff's omission of duty; and he now claims the right of a trial, on those principles of law of which his fellow-citizens enjoy the benefit and protection.

The counsel for the plaintiff has opposed the motion on several grounds, and has cited cases of different classes to support his objections. Some of the cases establish the principle that a new trial ought not to be granted because, after the trial, the incompetency of one or more witnesses who had testified in the cause had been discovered. Some of them were read to show that the omission of counsel, as to the examination of some of the evidence in the cause, or a misrecollection or forgetfulness of certain particulars, can furnish no ground for a new trial. Some have been cited to show that when objectionable evidence was offered, and not opposed, it must be considered as admitted by consent implied, and that this is no ground for a new trial, when the inadmissibility of the evidence was discovered. It was the duty of the party complaining to examine and object in season and thus preserve his rights. One case was read to show that, on certiorari to a justice's court, where the record stated that certain facts were proved, but it did not appear that the witnesses were sworn, the court sustained the proceedings, saying they would intend that they were sworn, because it was a part of the duty of the justice to swear them. In the case before us we are not at liberty to presume and intend what we know is not a fact.

None of the cases to which we have thus alluded are similar to the one before us; they were decided on principles which need not be examined on this occasion, and which we have therefore passed over by merely observing upon their import. Cases of another class have also been urged as decisive of the present motion. These are cases of objections to the legal qualification of jurors, and these were overruled, because not made in due season; that is, when the jury were called. Several cases of this kind have been decided where the party making the objection had no actual knowledge of the disqualification till after the trial. In some of them the motion for a new trial has been overruled; in others, it has prevailed. But where it has been denied, it will generally be found that the party objecting might have ascertained the fact on which he relies, before or at the trial, had he strictly guarded his own rights with watchfulness, as the law requires that he should have done. Generally speaking, it

is the duty of both parties to look to the qualification of jurors and attend to their challenges; but it is the duty of each party to attend to the qualification of his own witnesses, by procuring them to be duly sworn before they are examined in the cause. It should be remarked that in all the above cases the juror was duly sworn.

If it be inquired, what can be the advantage of another trial, it may be replied that Leonard may not again testify in the cause; that he may be beyond the reach of the process of this court; that he may not be living at the time of another trial; or, should he attend the trial, that his testimony may be less direct or less distinct, or less favorable to the interests of the plaintiff. All these are circumstances on which a party may make his own calculations as to probabilities, and draw his own conclusions; and as illegal evidence has been submitted to the jury, though unintentionally, the defendant now insists on his claim to a new trial, to be conducted in all respects according to law.

In this view of the case, so peculiar in its nature, we incline to the opinion that the claim ought not to be disregarded by the court, and accordingly the verdict is set aside and a new trial granted.

DANA v. COOMBS.

[6 GREENLEAF, 89.]

RATIFICATION OF CONTRACT OF INFANT.—Where an infant purchases land and gives a mortgage thereon to the mortgagee of his vendor as a part of the consideration of the deed, a conveyance by him of said land after he becomes of full age is a ratification of the mortgage.

A NEW MORTGAGE GIVEN BY A VENDEE OF LAND, in lieu of a former mortgage by his vendor, and as a part of the consideration of the deed, and a deed of such vendor held in escrow by the mortgagee's agent and delivered at the same time as the deed, constitute one entire transaction, although the deed was executed prior to the execution of the mortgage.

WRIT of entry, in which the demandants counted on their seisin as mortgagees against the mortgagor. One Cushman, a former owner of the land, had mortgaged it to the demandants to secure a debt of six hundred dollars. Afterwards he sold the land to Coombs for seven hundred dollars, six hundred dollars of which was to be paid by procuring a discharge of the mortgage given to the demandants. The demandants consented to discharge Cushman on receiving a similar mortgage

from Coombs. Cushman made a deed of the land to Coombs and deposited it with the agent of the demandants, to be kept by him until the completion of the negotiation. After the execution of the deed, Coombs executed a mortgage to the demandants, and the deed and mortgage were delivered at the same time. At the time of these transactions Coombs was a minor, but he had told the demandants' agent that he was of full age, and they did not know to the contrary. After his arrival at majority, Coombs conveyed the premises to Edwards.

Whitman, for the tenant, contended that this case stood upon the general principle that the deed of an infant is voidable. The tenant's conveyance to Edwards showed that he held it void. He distinguished this from the case of *Hubbard v. Cummings*, 1 Greenl. 11. The tenant's false assertion to the agent of the demandants could not affect this action: *Conroe v. Birdsell*, 1 Johns. Cas. 127 [1 Am. Dec. 105]; *Taylor v. Croker*, 4 Esp. 137; *Boston Bank v. Chamberlain*, 15 Mass. 220.

Greenleaf and Keith, for the demandants.

By Court, *WESTON, J.* Certain deeds made by a minor are void; others are voidable only at his election. There has been some obscurity in the books as to the principle upon which this distinction is made. By some cases, those seem to have been considered voidable which were beneficial, or carried a semblance of benefit, to the infant. The law upon this point, as laid down in *Perkins*, sec. 12, is, that all gifts, grants, or deeds, made by infants, which do not take effect by delivery of his hand, are void; but all gifts, grants or deeds which do take effect by delivery of his hand are voidable. This was adopted as sound law in *Zouch v. Parsons*, 3 Burr. 1794, and in subsequent cases. Letters of attorney, or deeds which delegate a mere power and convey no interest, are put as examples of the former class; and deeds of land, or which convey an interest, of the latter. The deed of an infant, therefore, conveying his land, whether absolutely or on condition, is not void but voidable. The deed under which the demandants claim is of this description. On the one hand, it is insisted that it has been avoided by the grantor after he arrived at full age; on the other, that it has been affirmed.

In the case of *Zouch v. Parsons*, Lord Mansfield discussed the privilege of infants, which he says was given as a shield, and not as a sword, and that it ought never to be turned into an offensive weapon of fraud or injustice; that the end of the priv-

ilege is to protect infants; and that to this object all the rules and their exceptions must be directed. If an infant, when he arrives at full age, affirms a deed made to himself, he affirms the whole contract. It is not competent for him to claim to hold the land, and to avoid payment of the consideration he stipulated to give for it. Where his securities are given to the vendor, this would probably not be controverted, and it is fully recognized in *Hubbard v. Cummings*, cited in the argument. But the circumstance to whom the consideration is made payable, does not change the character of the transaction. To the infant it is of no importance to whom he is to make payment, whether to the person of whom he purchases or to any other person whom he may appoint. If the vendor receives negotiable notes, and indorses them over, they are as valid in the hands of the indorsee as of the payee. So is a mortgage taken as collateral security in the hands of an assignee. The protection of the infant, which is the ground upon which his privilege turns, does not require any difference or discrimination in these cases. The vendor chooses to have the notes given as the consideration, and the mortgage by which they are secured made directly to his creditor. The creditor is willing to receive them. Shall the minor, when he arrives at full age, elect to hold the land, and yet avoid the payment of the notes thus given, and the mortgage by which they are secured? It would be gross injustice so to adjudge, and it is not necessary for his protection. That object is fully answered, by leaving it to his election to determine, when arrived at an age at which he is by law deemed competent to manage his own concerns, whether he had made an improvident bargain, and whether, upon the whole, it was most for his interest to affirm or avoid it. What was the consideration which the tenant argued to give Cushman for the land in question? The land being of the value of seven hundred dollars, he was to pay one hundred to Cushman, and the remaining six hundred he was to pay to the demandants, his creditors.

This arrangement was more beneficial to the tenant than if the whole consideration had been made payable to Cushman. For after he had paid Cushman, the latter might not have extinguished the mortgage, and the demandants might have held the land, upon which they had a lien, for their debt. It is not denied that if notes to the whole amount had been given to Cushman, secured by a mortgage to him, and the tenant had affirmed the contract by conveying the land at full age, the in-

incumbrance created by him would have attached. And yet that would have left the land incumbered also by the demandants' claim. How much more provident and prudent it was for the tenant to take the course he did, by which his purchase was relieved from all incumbrance except that created by his own debt, which he was bound upon every principle to pay, if he thought proper to retain the land. The whole arrangement was one transaction, as much as if all concerned had been present, and the instrument had been executed on the same day. They all took effect at the same time, Cushman's deed remaining an escrow in the hands of Norton, until the negotiation between the tenant and demandants was completed. Suppose the demandants, instead of suing the mortgage, had sued the tenant upon his notes. If he had set up the defense of infancy, it might well have been answered that they were given as part of the consideration for the purchase of the land which the tenant at full age chose to retain. And this act of his is equivalent to an express promise to pay the notes. If the notes would be good, the mortgage is good by which they are secured. They all stand upon the same principle. By discharging their mortgage from Cushman, the demandants virtually united with him in assuring the land to the tenant. There was a privity between all concerned, by which what was done may, and ought to be, considered as parts of the same contract. If the tenant would affirm, he must affirm the whole. He cannot adopt part and reject part. Nor is injustice, from this view of the case, done to Edwards, the tenant's grantee. He took the land, as every other grantee does, subject to all prior lawful incumbrances. If he has not retained a part of the purchase-money, to be applied to their extinguishment, he is, or might have been secured by the covenants of his grantor. Upon the facts agreed, the opinion of the court is that the tenant must be called.

Tenant defaulted.

BOWDOINHAM v. RICHMOND.

[6 GREENLEAF, 112.]

UNCONSTITUTIONALITY OF ACT IMPAIRING OBLIGATION OF CONTRACT.—

Where an act, incorporating part of a town into a new town, provided that the latter should support its proportion of all the paupers then supported, in whole or in part, by the original town, a subsequent act, exonerating the new town from such liability, in future, is unconstitutional and void, as impairing the obligation of contracts.

ASSUMPT upon a case stated by the parties. The opinion states the case.

Greenleaf and Jewett, for the plaintiffs.

Allen, for the defendants.

MELLEN, C. J. On the tenth of February, 1823, when the town of Bowdoinham was divided, and the northerly part of it erected into a town by the name of Richmond, all the paupers, sixteen in number, which were then chargeable as such to Bowdoinham, lived in that part of the original town which is now Bowdoinham, except one, and she lived in that part of the original town which is now Richmond. The act of incorporation, in the fifth section, declares, "that the said town of Richmond shall be held to support their proportion of all paupers now supported in whole or in part by Bowdoinham." And after giving certain rights to each town, the section is concluded in these words, "and if either town shall neglect or refuse to comply with the provisions of this act, the other town may have an action on the case against such delinquent town, to recover what in equity and good conscience may be due to it." Upon the petition of the town of Richmond, the legislature, on the fifteenth of February, 1825, passed another act, declaring, "that from and after the first day of May next, the town of Richmond shall not be holden to support or contribute to the support of any pauper who resided within the limits of the town of Bowdoinham on the tenth day of February, 1823, but shall be holden to support all paupers who reside on that day within the limits of the town of Richmond." On the presentment of the petition by Richmond for this second act, the usual notice was ordered and given; but no notice was taken of it by Bowdoinham, or any of its officers. The question is whether Bowdoinham is bound by this second act, to the passage of which they never gave any express or implied assent. It is admitted that the legislature has power to incorporate towns of such dimensions and form, and by such boundaries, as they may judge proper, and alter such boundaries at their pleasure; and that they may, by annexing a part of one town to an adjoining town, materially change the amount and value of the taxable property, as well as the number of inhabitants, by enlarging one town and diminishing the other.

As we had occasion to observe in *North Yarmouth v. Cumberland*, 6 Greenl. 29, it is matter of notoriety that where towns are divided, it is done on petition, and after an order of notice;

the object of which notice is that the town may be heard, and, if divided, that its interest may be guarded by such provisions in the act as circumstances may render just and proper; and these are generally matters of arrangement by those immediately to be affected. In such a manner, according to the common course of business, the provisions of the act incorporating Richmond, without any question, were prepared. Having been made a part of the act of incorporation, and Richmond having complied with the terms of the act, and for two years paid to Bowdoinham the proportion of pauper expense due to them according to the above terms, we must consider the arrangements and provisions before mentioned in the nature of a contract, whereby Bowdoinham had acquired a vested right to the settled proportion of the expense of supporting the paupers living in Bowdoinham at the time the act of incorporation was passed, and a vested right of action to recover such proportion. The act of February 15, 1825, professes to absolve the town of Richmond from the payment of a large part of the proportion of expense which they were bound by the first act to pay to Bowdoinham. Had the legislature a constitutional right to pass the latter act, in its very terms impairing the obligation of the contract on the part of Richmond, created by the first act? If it does impair the obligation of a contract, then, according to the express language of the constitution of the United States and of this state, the legislature transcended their powers in enacting it, and this court is bound to declare it void; for they are bound to support those constitutions. No law ought to be pronounced unconstitutional and void, unless it appears clearly to be so; but when such is the fact, our duty is plain. It is not, however, to be supposed that such laws are ever enacted with a belief or apprehension of their unconstitutionality at the time.

The cases cited by the counsel for the plaintiff seem to establish the principle on which he relies. In *Brunswick v. Litchfield*, 2 Greenl. 28, and in *Hampshire v. Franklin*, 16 Mass. 88, cited by the defendants' counsel, it is distinctly declared that no act or resolve of the legislature can of itself create a debt from one corporation or person to another, but only by the consent, express or implied, of the party to be charged. We think no such assent can be implied from the silence of Bowdoinham, in respect to the petition for the passage of the second act. The town probably considered that the legislature had no authority to pass such a law, and chose to leave the question of constitutionality, should

it become necessary, to judicial decision. The counsel for the defendants has placed the defense of the cause upon the power of the legislature as to the incorporation of towns and change of boundaries, and annexation of particular persons or estates to one town, formerly belonging to another. It is contended that by the exercise of this acknowledged power, the legislature may increase the expenses and taxes of the inhabitants of one town, and in the same degree diminish those of the inhabitants of another town, by increasing its population and property; and that what may be done lawfully in an indirect manner may be lawfully done in a direct one. We do not perceive the merits of this argument. It does not meet the objection urged by the plaintiff's counsel. It is true that a change of boundaries or transfer of individuals from one town to another, with their property, may produce the effect stated; but increasing the taxes on the individuals of a town, reduced in numbers and property in the manner mentioned, has no effect whatever upon the contracts of the corporation and the obligations imposed by those contracts. The claim of one town on another town is not in any degree impaired by such changes as to boundaries, or property, or inhabitants. The burdens of the diminished town may be increased on the inhabitants, but a creditor of the town suffers nothing by this circumstance. The latter act, if enforced, would benefit the town of Richmond, by relieving them from the payment of a part of the debt they owe to Bowdoinham; and would injure that town by divesting them of a part of their property and the right to recover its value. Legitimate legislation can not produce such effects as these.

We therefore, though unwillingly, must pronounce the act of the fifteenth of February, 1825, as repugnant to the constitution of the United States and of this state, for the reason assigned in this opinion. According to the agreement of the parties, the defendants must be defaulted.

COTTLE v. COTTLE.

[6 GREENLEAF, 140.]

SETTING ASIDE VERDICT FOR IMPROPER CONDUCT OF JUROR.—Where the prevailing party to an action, during the term of court, but previous to the trial, took one of the jurors in his sleigh several miles to the house of a friend, where he was hospitably entertained, the verdict was for this cause set aside.

Motion to set aside verdict. The opinion states the case.

Williams, for the plaintiff.

Fuller, for the defendant.

WESTON, J. The party obtaining a verdict in this case did, during the session of the court at which his action was tried, carry one of the jury to whom his cause was submitted, knowing him to be a juror, several miles in a sleigh to the house of a friend of the party, where the juror was gratuitously provided with refreshments and lodging. Whether furnished at the party's own house, or at the house of another by his procurement, either as an act of hospitality, or for a pecuniary compensation to be paid by the party, it is equally exceptionable. This is by statute made a sufficient reason, at the discretion of the court, to set aside the verdict: Stat. 1821, c. 84, sec. 15. There is no doubt, also, that at common law, independent of the statute, it would afford just ground for the interposition of the court. There is too much reason to believe that the party intended to practice with the juror. He sought his society, and attempted to impress his mind with the justice of his claim. It is insisted that the juror was not in fact influenced, and that justice has been done between the parties. It may be so; but it may be useful to the party to learn that a good cause may be injured, but can not be promoted, by conduct of this sort, and to the public generally, to know that it will be tolerated in no case whatever.

New trial granted.

FARRAR v. STACKPOLE.

[6 GREENLEAF, 154.]

PROPERTY IN ITS NATURE PERSONAL, WHEN FITTED AND PREPARED TO BE USED WITH REAL ESTATE, and necessary for its beneficial use, becomes a part of the realty, and, if on the premises at the time of the conveyance, passes by deed of such realty.

CONVEYANCE OF SAW-MILL WITH APPURTENANCES conveys the mill-chains, dogs and bars, in their proper places in the mill at the time of the execution of the deed.

PAROL EVIDENCE OF USAGE is admissible to explain the terms of a deed.

TROVER for a mill-chain, dogs and bars, tried upon the general issue. The plaintiffs claimed title under a deed from the defendant to Bedington, and from him to them, conveying a saw-mill, with the privileges and appurtenances. They proved

that the chain, dogs and bars were in their appropriate places in the mill when the deeds were made. The chain was so arranged that it could be hooked or unhooked at pleasure, and the judge, for this reason, ruled that it was a personal chattel, which did not pass by the deed, unless by uniform usage it was considered part of the mill. Both sides offered evidence on the question of usage, and the jury found for the plaintiffs.

Allen, for the defendant, contended that parol testimony was inadmissible: 1. Because it went to control a contract in writing which contained neither a latent ambiguity nor any reference to extraneous circumstances: *King v. King*, 7 Mass. 496; *Brigham v. Rogers*, 17 Id. 571; *Bayard v. Malcolm*, 1 Johns. 453. 2. If the chattels were personal estate, they are not conveyed by the deed; if they are part of the realty, then the parol testimony was inadmissible by the statute of frauds. 3. If the evidence was meant to prove an independent contract, it is opposed by the statute of frauds, because there was no delivery, no memorandum in writing, nor earnest paid, and the value exceeded thirty dollars: *Heermance v. Vernony*, 6 Johns. 5. These chattels did not pass by a deed of the mill, because they were not fixtures: *Elwes v. Maw*, 3 East, 28; *Cresson v. Stout*, 17 Johns. 116 [8 Am. Dec. 373]; *Briggs v. Strange*, 17 Mass. 406; *Gale v. Ward*, 14 Id. 353 [7 Am. Dec. 223]; *Union Bank v. Emerson*, 15 Id. 159.

Williams, Redington and Codman, for the plaintiffs.

By Court, WESTON, J. If the chain in question passed as a constituent part of the mill, the plaintiffs have made out their title, and have a right to judgment on the verdict. A considerable portion of the machinery and power of a mill, like that conveyed by the defendant, is designed to be applied to draw up logs into the mill, which is essential to the operation of one of this construction. It is not denied that other parts of the machinery intended for this purpose go with the mill; but it is insisted that the chain is of the nature of personal property, and therefore passes not by a deed of the realty unless specially named. To this it may be answered: 1. That if it be an essential part of the mill it is included in that term, whether real or personal; 2. That that which is in its nature personal may change its character if fixed, used, and appropriated to that which is real. Is it too much to say that the mill is incomplete, without a chain, a cable, or other substitute? It may be that a millwright, who contracts to erect a mill and to furnish mate-

rials, may be deemed to have completed his engagement without supplying a chain. One millwright, a witness in this case, has testified that such is his impression. And if this is understood generally, his contract might not extend further. But the owner would find that he had yet something more to procure before the mill could be in a position to operate. The chain is the last of the parts in the machinery to which the impelling power is communicated to effect the object in view. Its actual location in the succession of parts can make no difference. If it is in its nature essential to the mill, it is included in that term; and that, as has been before remarked, whether it be personal or real property. But, upon consideration, we are of opinion that it ought to be regarded as appertaining to and constituting a part of the realty.

It is an ancient principle of law, that certain things which in their nature are personal property, when attached to the realty become part of it as fixtures. One criterion is, that if that which is ordinarily personal be so fixed to the realty that it can not be severed therefrom without damage, it becomes part of the realty; as wainscot work, and old fixed and dormant tables and benches. Other things pass as incident to the realty; as doves in a dove house, fish in a pond, or deer in a park: 2 Com. Dig. Biens B. On the other hand, as between landlord and tenant, for the benefit of trade, in modern times many things are regarded as personal which, as between the heir and executor, would descend to the heir as part of the inheritance. Although the being fastened or fixed to the freehold is the leading principle in many of the cases in regard to fixtures, it has not been the only one. Windows, doors, and window shutters are often hung, but not fastened, to a building. Yet, they are properly part of the real estate and pass with it, because it is not the mere fixing or fastening which is regarded, but the use, nature, and intention; Dane's Abr. c. 76, art. 8, sec. 39. Modern times have been fruitful in inventions and improvements for the more secure and comfortable use of buildings as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun whenever it is desirable to do so, are of modern use; so are lightning rods, which have now become common in this country and in Europe. These might be removed from buildings without damage, yet as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by deed as

appertaining to the realty. But the genius and enterprise of the last half century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, to an infinite variety of purposes for the saving of human labor. Hence there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron, and marble, some under the denomination of mills, and others of factories, propelled generally by water power, but sometimes by steam. These establishments have in many instances, perhaps in most, acquired a general name which is understood to embrace all their essential parts, not only the building which shelters, incloses, and secures the machinery, but the machinery itself. Much of it might be easily detached without injury to the remaining parts or to the building, but it would be a very narrow construction which should exclude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence in the progress of society, according to their nature and incidents and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms, applied to new subjects, as they arise. In other words, it will understand terms used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning and acceptance.

There was at Bath, in this state, a saw mill propelled by steam, generally called the steam saw mill. Suppose this establishment had been conveyed by the name of steam saw mill, without a more particular description. What would pass? There is nothing in the books with respect to this species of property, for it is of quite modern invention, and there is no other mill of the kind in this part of the country. If you exclude such parts of the machinery as may be detached without injury to the other parts or to the building, you leave it mutilated, incomplete, and insufficient to perform its intended operations. The parties, in using the general term, would intend to embrace whatever was essential to it, according to its nature and design, and the law would doubtless so construe the conveyance as to effectuate the lawful intention of the parties. Salt pans have been held to pass with the realty, and to belong to the inheritance, because adapted and designed for, and incident to, an establishment for the manufacture of salt. The

principle is, that certain things personal in their nature, when fitted and prepared to be used with real estate, change their character and appertain to the realty as an incident or accessory to its principal. Upon this ground we are satisfied that the chain in question, being in the mill at the time, and essential to its beneficial enjoyment, passed by the deed of the defendant to Asa Redington, under whom the plaintiffs claim, independent of any reference to usage. The verdict is therefore sustained, although not upon a ground in accordance with the impressions of the judge who presided at the trial.

This we think, upon the whole, a fair application of the principles of law to the case. Had the term mill, however, by uniform and general usage, been understood not to embrace the chain, a different construction would no doubt have obtained; for it is a term of art, the proper meaning of which would be fixed by the general understanding of those who are skilled and experienced in it. If they were not agreed, the law would adopt that which was most general, and which would best accord with the nature and character of the subject-matter. The jury have found upon the evidence submitted to them, that by general and uniform usage the chain passed by a deed of the mill. This finding was somewhat stronger than the evidence warranted. It did appear that there had been exceptions to this usage, but the weight of evidence went to support it. At any rate, it is apparent that the usage is rather in favor than against the construction we have adopted. But we are of opinion that the title of the plaintiff is well supported by the deed; independent of usage, it becomes unnecessary to decide upon the competency or effect of the testimony adduced upon this point.

Judgment on the verdict.

In *Swift v. Thompson*, 9 Conn. 63, it was held that machinery of a cotton factory, in no way attached or secured to the building, consisting of spinning frames standing upon the floor, around the feet of which cleets were placed and nailed to the floor, and also of other machines, to the posts of which iron plates were attached, through which wood screws passed, fastening them into the floor, was personal property. In *Foorhis v. Freeman*, 2 Watts and Serg. 116, it was decided that in a manufactory or mill, machinery which is a constituent part of the manufactory, to the purposes of which the building has been adapted, and without which it would cease to be such manufactory, is a part of the freehold, although it be not actually fastened to it. In the case last cited, Gibson, C. J., delivering the opinion of the court, cited the case of *Farrar v. Stackpole*, and said that the principle therein stated "must sooner or later rule every case of the sort." In *Clay v. Holdship*, 17 Serg. & R. 413 [17 Am. Dec. 680], it was held that a copper kettle or boiler in a brew-house was a part of the freehold. See note to this case for an exhaustive discussion of this question.

EMERSON v. FISK.

[6 GREENLEAF, 200.]

OWNER OF LAND HAS A LIEN ON THE TIMBER cut on and removed from the land, where the contract under which the cutting and removal were done provides that he shall retain the sole ownership of the timber until he receives the proportion thereof allowed to him for stumpage and is paid all moneys due to him for advances made to the other parties to the contract; and where it is provided that the owner shall be paid for his proportion of the timber not cut by the other contractors within the time limited in the contract, and all the timber cut is pledged for such payment, he retains a lien on all the timber cut after as well as that cut during the time so limited.

A LICENSE TO CUT TIMBER ON THE GRANTOR'S LAND is not assignable.

BAILLEES FOR SPECIAL PURPOSE HAVE NO RIGHT TO SELL the property bailed, and, upon such sale, the bailment is determined, and the real owner may replevy it from the vendee.

REPLEVIN, for certain mill logs which the plaintiff alleged to be his property. The defendants claimed the logs under a purchase from Tobias Michael and Hugh Alexander, who had cut them principally in the year 1827, on land belonging to the plaintiff, under a contract made in November, 1825. By the contract the plaintiff granted them permission to enter upon the land and cut and carry away all the pine timber thereon suitable for boards. And Michael and Alexander bound themselves to cut and haul from the premises all the pine timber suitable for sawing into boards, and deposit the timber so cut safely in a boom, one fourth for the plaintiff and the other three fourths for themselves, but Emerson to retain the sole ownership of the whole until he had accepted his one fourth, and been paid all sums of money advanced to them by him. It was also agreed by them to pay to him the value of one fourth of all timber which they failed to cut and remove from the land during the winter and spring of 1825, for the payment of which sum all the timber referred to above should be pledged. After the plaintiff's one fourth was taken out and all advances made by him paid, the remaining three fourths of the timber was to be delivered over to Michael and Alexander. The contract was under seal and signed by plaintiff and Michael only. The plaintiff proved by the declarations of the defendants that they had purchased the interest of Michael and Alexander in the logs and were ready to fulfill the obligations of their vendors to the plaintiff. The logs were replevied while on their way to Stillwater, where they were to be placed in the boom. It also appeared that at the time of the replevin Michael and Alexander

were indebted to the plaintiff in a sum exceeding six hundred dollars, and it was the general usage in that part of the country, in cases like this, for the owner of the land to retain a lien on the logs for the security of his fourth part. The defendants requested the judge to instruct the jury that the plaintiff had no right to replevy the logs, but the judge instructed them that he had in such case the right to replevy them. The jury found for the plaintiff, and the judge, at the defendants' request, reserved the question of the correctness of his instructions for the opinion of the court.

Allen and McGaw, for the defendants, contended that this action would not lie, because the possession of the defendants was lawful. The plaintiff, by his own contract, had no right to the possession until the logs should arrive at Stillwater: *Wyman v. Dorr*, 3 Greenl. 183; *Ward v. McAuley*, 4 T. R. 489; *Gordon v. Harper*, 7 Id. 9; *Smith v. Plummer*, 15 East, 489.

Gilman and Sprague, for the plaintiff.

By Court, *WELTON, J.* The issue submitted to the jury in this case was, whether the logs in controversy were the property of the plaintiff. They were instructed by the judge at the trial that if they were satisfied that the timber was cut on the land described in the contract made between the plaintiff and Tobias Michael and Hugh Alexander, on the thirtieth of November, 1825, the plaintiff was entitled to their verdict. We are called upon to decide upon the correctness of this instruction. The timber was originally the property of the plaintiff, and must be understood to have continued his, unless he had parted with it. Michael and Alexander had permission to enter upon the land, to cut the timber, to cause it to be transported to Stillwater, there to saw it, and thence to run the boards to Bangor. That no question might arise as to whose property the timber, logs, and boards were to be considered in their various stages, it was expressly provided that the plaintiff should retain the sole ownership until satisfied that the fourth part, to be deposited for his special use, was "of an average quality with the whole, and until paid all money and debts due to said Emerson from said Tobias and Hugh, or either of them, at that time, for either money, goods, oxen, or any other advances made for them." It is therefore so far from being true that any change of property in the transit is to be implied from the contract, that it is therein expressly negatived.

It is, however, insisted that these terms are limited to the

timber that should be cut the winter and spring following the date of the contract, and that they do not attach to such as might be cut subsequently; that Michael and Alexander were the purchasers of the timber, which remained on the land after 1826; and that the logs replevied, having been wholly or principally cut in 1827, can not be regarded as the property of the plaintiff. They stipulated that they would cut all the pine timber suitable for boards, within the limits specified, which a prudent man would cut from his own land. But for this provision, their interests might have tempted them to cut only that which was most valuable and most accessible. That the plaintiff might be secure on this point, he required that they should pay for what might remain after the first season in the same manner as if they had cut the whole; and that he should retain for the fulfillment of this part of the agreement, as much as for his fourth part of what might be actually cut the first season, and for his advances. If these engagements on their part had actually been complied with in 1826, and the plaintiff had been paid for his whole timber and advances, that which remained on the land might be considered as transferred to them for their separate and proper use. This, although not expressly stipulated, would fairly result from the fact of payment. But payment is not pretended. If by the terms of the contract the plaintiff's right to retain his original title to the timber was restricted to such as might be cut the first season; if they abstained from cutting that season, he would subsequently retain only a personal remedy against them for the timber and advances, upon which it is manifest he did not intend to rely. He clearly guards against such an implication, providing that no part of the property should be held to be theirs, until he was paid and indemnified. Then, and then only, such of the boards as might not be wanted for this purpose were to be delivered over to them.

But it is urged that if the general property was in the plaintiff, yet, if at the time of the replevin he had no right to the possession, his action can not be maintained; and that he was not entitled to possession while the logs were on their way to the place of their destination. It might admit of question whether, if Michael and Alexander had not sold the logs, the plaintiff might not have taken possession of them in their transit, as he expressly retained the sole ownership to himself. If he had done so, to the prejudice of their just expectations under the contract, he would doubtless have been bound to indemnify

them for any loss they might have suffered from his interference. But however this may be, we are well satisfied that the agency, authority, or license given or confided to them by the plaintiff was not assignable. The plaintiff had a right to appoint his own agents in the management of his property, and they could have no authority to substitute others. If a party license A. to cut timber upon his grounds, A. has no right to transfer such license to B. The owner may repose a confidence in the one, which he would not extend to the other. The plaintiff was to remain the sole owner. This would seem to take away all pretense even of special property on the part of Michael and Alexander, leaving them only a charge or oversight of the logs, but entitled by contract to a specific compensation. But suppose they had a special property, it could only be as bailees for a special purpose. They clearly had no authority to sell the logs. This would be entirely inconsistent with the rights of the plaintiff as the general owner. But this unauthorized act, the bailment, and their authority under it, was determined. The defendants could derive no right from the tortious act of Michael and Alexander. The plaintiff, the original proprietor, chose to retain to himself his right as sole owner until his demands were satisfied. This right, the defendants having shown no sufficient title against him, has been properly sustained by the verdict.

The rule which precludes counsel from commenting on the non-production of a paper by the adverse party, unless such party has been notified to produce it before trial, is designed to protect him from any unfavorable inferences to be drawn from his omission to do what he might not know would be expected of him. It is founded, also, upon the presumption that if seasonable notice had been given to the party, he might have produced the evidence required. As the trial in the case before us consumed part of two days, as the paper in question was within a few rods of the court house, and the defendants were notified to produce it the first day of the trial, which they declined to do, the presiding judge, being of opinion that it was not a case within the reason of the rule, permitted the counsel for the plaintiff to comment on its non-production. Upon consideration, we think it better that it should be understood hereafter that the rule will be uniformly enforced according to its terms; yet under the circumstances of this case, we are of opinion that the verdict ought not to be disturbed upon this objection.

Judgment on the verdict.

BANGOR BANK v. TREAT.

[6 GREENLEAF, 207.]

BRINGING AN ACTION AGAINST ONE OF THE MAKERS OF A JOINT AND SEVERAL NOTE is an election by the plaintiff to treat it as a several contract; and judgment against one does not enable the plaintiff to treat it as a joint contract as to the others.

ASSUMPSIT. The opinion states the case.

Williamson, for the plaintiffs.

Gilman, for the defendants.

By Court, **MELLEN, C. J.** This is an action of assumpsit, and the declaration states that the note was signed by the defendants and Allen Gilman, jointly and severally, and that a judgment had been recovered on the note against Gilman in a several action against him. The defendants have moved in arrest of judgment, on account of the joinder of them in the present suit. When three persons by bond, covenant or note, jointly and severally contract, the creditor may treat the contract as joint or several at his election, and may join all in the same action, or sue each one severally; but he cannot, except in one case, sue two of the three, because that is treating the contract neither as joint nor several. But if one of the three be dead, and that fact be averred in the declaration, the surviving two may be joined. In the present case, Gilman is living. The plaintiffs contend that as judgment had been recovered against him, such judgment entitled them to join the other two in the same manner as though he was dead. This is not so. When they sued Gilman alone, they elected to consider the promise or contract as several, and having obtained judgment, they are bound by such election. In case of death, the act of God has deprived the party of the power of joining all the contractors, but he may still consider the contract as joint, and sue the surviving two. The plaintiffs have disabled themselves from maintaining this action by their former one: 1 Saund. 291, e. The objection is good in arrest of judgment, where the fact relied on by defendants appears on the record, as in the present case.

Judgment arrested.

WILKINS v. REED.

[6 GREENLEAF, 220.]

LIABILITY OF JOINT OWNERS OF VESSEL FOR SUPPLIES.—A negotiable note given for supplies for a vessel given by one of two joint owners, who was also the master, jointly in his own and the other owner's name, but without authority of the latter, is void as to him; but both owners are liable to the promisee on the general counts.

ASSUMPSIT, by the promisees against the makers of a promissory note, with the common money counts, a *quantum valebant*, and an *insimul computassent*. All the counts were for the same cause of action. The defendants, Reed and Libby, were joint owners of a schooner, of which the former was master. The plaintiffs furnished her supplies, for which they took a promissory note, signed by Reed in his own name and Libby's jointly. Libby pleaded that he never promised jointly with Reed, and claimed that he was not liable on the general counts, because the implied contract was merged in the negotiable note given by Reed. The judge instructed the jury that the note was accepted in payment of the account only on the faith that both defendants were holden on it, and if one of them was not bound he was still liable on the original cause of action. The verdict was for the plaintiffs, which was taken subject to the opinion of the court on the correctness of the instructions.

Crosby, for the plaintiffs.

Wilson, for the defendants.

By Court, MELLER, C. J. The note declared on is in form a joint one, and the case finds that it was never signed by Libby, or by his authority, and therefore the action is not maintainable on the first count; and the only question is, whether it is on either of the general counts, upon the original cause of action. The note being negotiable, is said to have merged all implied promises, and that therefore the remedy of the plaintiffs exists only against Reed upon the note, on which he may sustain a several action against him. There is no doubt as to the principle relied on by the defendants, where the parties to the implied and the express promise are the same. Nor is there any doubt that when a creditor of two persons, knowingly and intentionally takes the security of one of them only, which security is valid in law, the other original debtor is considered discharged. But in the present case there is no pretense for supposing that the plaintiffs ever intended to extinguish the liability of Libby.

The very form of the signature of the note proves the contrary. Libby never could be sued on the original account, except by the present plaintiffs; and in such an action, the verdict and judgment in this action would be pleadable in bar. He can not, therefore, be endangered, as the note is void in respect to him. Perfect justice has been done by the verdict; and both defendants are safe. Our opinion is, that the instructions of the judge were correct.

Judgment on the verdict.

CASES

IN THE

COURT OF APPEALS

OF

MARYLAND.

PAWSON'S ADM'RS v. DONNELL.

[1 GILL & JOHNSON, 1.]

WHERE THE EVIDENCE IS CONTRADICTIONARY, it is the unquestionable and exclusive right of the jury to determine the facts.

CHANGING THE VOYAGE.—The owner of the ship and cargo has the uncontrolled power of breaking up or changing the voyage.

IDEM.—The effect of the exercise of such power upon the contract between the owner, and master or supercargo, must be governed by these principles, in the absence of all commercial usage on the subject: If special injury be done thereby to the captain or supercargo, the ship owner must bear the loss. If the captain or supercargo be thereby necessarily discharged from the performance of all the duties, for which a remuneration has been stipulated, the claim to such remuneration becomes extinguished. If part of the duties have been performed, such proportion of the remuneration should be allowed as appears just on comparing the services rendered, under the voyage originally contemplated, with those remaining unperformed.

IDEM.—The parties should be placed, as nearly as may be, in the same condition in which they would have stood, had a previous contract for the voyage as changed have been entered into between them.

THE CAPTAIN'S PRIVILEGE agreed to be allowed from a certain port contemplated by the original voyage necessarily expires when that port ceases to be one of the *termini* of the voyage, by reason of a change of instructions given by the owner.

MISCONDUCT OF THE CAPTAIN producing neither injury nor inconvenience to the owner is no defense to an action for the payment of wages.

THE CONSIGNEES SELECTED BY THE SHIPMASTER, or supercargo, in a foreign port, according to usage, and *bona fide*, are so far the agents of the owner of the ship and cargo that upon the death of the captain or supercargo, his representatives are not responsible for the acts of such consignees after his death, not imputable to instructions given during his life-time.

A SHIPMENT OF PROHIBITED MERCHANDISE by the supercargo on the owner's account, but without his knowledge or consent, is at the supercargo's risk.

IDEM.—The acceptance by the owner of the letters and invoices sent to him by the consignees in a foreign port is not such a ratification of their acts as would throw on him the loss arising from the seizure of prohibited articles exported by them on his account.

CROSS-APPEALS from a judgment rendered in favor of the plaintiffs in an action of assumpsit against defendant, Donnell, the appellee in the first, and the appellant in the second of these appeals. The declaration contained two counts, one for work and labor, etc., goods sold and delivered, money lent, and for money had and received; and the other on an *insimul computassent*. Plea, non-assumpsit, and joinder. It was stipulated by the parties that the defendant might give in evidence any set-off, the same as if it had been pleaded; that errors in the pleadings of either party should be waived, and special matter be allowed to be given in evidence; and that the plaintiffs' intestate, John C. Pawson, was to receive sixty dollars a month as captain of the ship Chesapeake, together with the sum of two thousand dollars compensation, as referred to in the letter of instructions introduced. The plaintiff read in evidence the following letters of instructions, such parts only being here reproduced as are material to the understanding of the points decided. The first was from the defendant to the plaintiffs' intestate, and was dated Baltimore, November 18, 1819: "With my ship Chesapeake, of which you are commander, you will proceed with all possible dispatch to the port of London." The letter directed Capt. Pawson to obtain from one John Horstman, the consignee, eight thousand doubloons, and stow the coin on the vessel. It then proceeded: "With the ship and the coin on board, you will proceed to the port of Coquimbo, in Chili, for the purpose of loading entirely with copper, and with it proceed to Canton; there dispose of it, and with the proceeds load your ship agreeably to the list I have furnished, and return with the same direct to me here." Some advice in regard to the keeping of the coin, the management of the cargo, and certain instructions touching the recovery of money due from residents at Coquimbo followed, when this letter continued: "To prevent misunderstanding, I deem it necessary to state your compensation to be two thousand dollars, payable on your return, with a privilege from Canton, not to exceed twenty-five tons, but it is to be understood that you are not to put any copper or heavy article on board at Chili, as

my views are that you completely load her there with copper, and that only for my account. After my property and your privilege are on board, and the ship should not be full, if freight offers deliverable here, you will accept it." There was also a provision in this letter, directing Capt. Pawson, in case he could not get the copper at Chili, to sail to Batavia, and purchase a cargo of coffee. "When you complete your business in Batavia, you will proceed from thence direct to this port. In stating your privilege, it is to be understood the twenty-five tons are measurement, and if in weighty articles, twenty-five thousand pounds."

The second letter, from the defendant to the plaintiffs' intestate, dated at Baltimore, December 26, 1819, contained the following material direction. After stating that subsequent reflection and calculation had led the defendant to believe that it would be more profitable to return from Chili to Baltimore than to proceed to Canton and thence home, he wrote: "I, therefore, revoke and countermand the orders I gave to you to proceed from Chili to Canton, and now substitute that you will return with the ship and cargo of copper direct from the coast of Chili to Baltimore. As relates to the investment of your own funds, you must use your own discretion by investing it in copper or anything else, and bringing it with you in the ship."

The plaintiffs offered in evidence that the Chesapeake was owned by Donnell at the time of the dates of the letters introduced, and that Pawson was master and supercargo at the date of the letter of instructions, and so continued until his death. The vessel sailed to London, thence to Coquimbo, where she arrived August 15, 1820. Captain Pawson died there December 4, 1820. The mate, Thomas A. Lane, took charge of the vessel, and after a voyage to Guasco, returned to Baltimore October 1, 1821. A large amount of correspondence was given in evidence, comprising letters from the deceased Captain Pawson to the defendants, and to their consignee in London, Horstman, from the latter to Captain Pawson and to the defendants, and from Edward & Stewart, a firm at Coquimbo, with which Pawson had dealings, to the defendants. From these letters it appeared that the doubloons were obtained in London, and were valued at one hundred and thirty-eight thousand dollars. The coin was shipped, and at Coquimbo arrangements made for the purchase of the desired amount of copper through Edward & Stewart. Pawson sailed from London in ballast with certain cordage on board, which he disposed of at Coquimbo on behalf

of himself and of one Goddard. While at Coquimbo awaiting a crew, his having deserted, Pawson died. The mate, Lane, took charge, sailed to Guasco, and received on board a large amount of gold bullion, the property of Donnell, and some silver bullion belonging to the deceased Pawson. This bullion was subsequently seized by the government.

Certain long accounts between Donnell and Pawson were also given in evidence. It was admitted that the transaction of cordage, from London to Coquimbo, was as stated in the accounts, and that the cordage was for the joint account of Pawson and Goddard; and that gold and silver bullion were prohibited articles of exportation at Chili. The defendant offered in evidence that the usual freight from London to Coquimbo was fifty dollars per ton. The plaintiffs then offered in evidence that it was the usage among ship owners and masters not to charge freight where the ship was in ballast, for any articles shipped by the captain on his own account. The defendant offered in evidence, that there was no usage as above stated, and that the captain was liable for freight to his owners, like any other person, if the owner chose to exact it.

The matters in controversy between the parties resolve themselves into three main questions: 1. Whether Donnell is entitled to charge freight on the goods of Pawson, shipped "on his own account" from London to Coquimbo? 2. Are Pawson's administrators entitled to recover any part of the two thousand dollars mentioned in the letter of instruction? 3. Are the administrators entitled to recover compensation for the privilege from Canton to Baltimore, of which Pawson was deprived by the act of Donnell in changing the voyage originally contemplated?

Several exceptions were taken: 1. The defendant prayed the instruction to the jury that he was entitled to set off the freight on the cordage from London. The court, Archer, C. J., and Ward, J., refused to give this direction, and stated that the freight should be set off unless the plaintiffs can show by testimony that there was a known and established usage that the captain under the circumstances was not chargeable with freight, and that the usage was so well known as to have been contemplated by the parties when they made their contract. The defendant excepted. 2. An instruction asked by the defendant that the privilege from Canton to Baltimore was voluntarily waived by Captain Pawson was refused, and the jury directed that the plaintiffs were entitled to recover for the loss

of the privilege, in consequence of the change of the voyage, unless the plaintiffs' intestate did, with a knowledge of his legal rights, waive the benefit of the privilege accorded to him at the commencement of the voyage, and did accept in lieu thereof a privilege from Coquimbo to Baltimore. The defendant excepted. 3. The defendant prayed the instruction that if the jury believed the contract between Pawson and Donnell was an entire one for two thousand dollars, for the faithful performance of the duties of supercargo by the former, then the receiving on board prohibited articles, thereby placing the vessel in jeopardy, was an infringement of the entire contract, and took away from the plaintiffs any right to demand the fulfillment of the same on the part of the defendant. The direction not being given, the defendant excepted. 4. The defendant asked the instruction that the compensation of two thousand dollars agreed to be paid was subject to abatement in the discretion of the jury, on two grounds: The shortening of the voyage by leaving out the trip to Canton, and the death of Captain Pawson before the completion of the voyage. But the court were of opinion, and so directed, that if the jury believed the evidence, the plaintiffs were entitled to recover a ratable proportion of the two thousand dollars, computing the time from the commencement of the voyage to Captain Pawson's death, and from his death until the duties of supercargo were completed by the signing of the bill of lading for the homeward voyage. The defendant excepted. 5. The defendant asked the instruction that the compensation was for an entire voyage from Baltimore to Canton and return; that the same understanding in regard to the compensation must exist with respect to the substituted voyage to Coquimbo and return; and that, therefore, the two thousand dollars could not be apportioned, and the whole sum was lost by Captain Pawson's death before the voyage was completed. This instruction being refused, the defendant excepted. 6. This exception related to the value of the privilege, and that it was subject to the safe arrival of the vessel at Canton. The examination of this exception was rendered unnecessary by reason of the opinion upon the second exception. 7. The defendant further prayed the court to direct that the plaintiffs were not entitled to recover the two thousand dollars, or any part thereof; and, the direction being refused, excepted. 8. The defendant also prayed the court to direct the jury that if the jury believe that Captain Pawson had actually purchased before his death a sufficient

quantity of copper, which, with the other property purchased by Captain Pawson for account of the defendant and afterwards put on board, was sufficient to exhaust the funds of the defendant confided by him to Pawson, then the plaintiffs are not entitled to recover the compensation of two thousand dollars mentioned in the letters of instruction of the defendant, unless the defendant received on board his ship a sufficient quantity of copper to exhaust his said funds. The instruction, the court refused to give. The defendant excepted. 9. This exception was in regard to the waiver of the privilege as a consequence of law, which Pawson must have considered if he knew the facts. The instruction asked by the defendant was refused, whereupon he excepted.

The remaining exceptions were taken by the plaintiffs. 10. Plaintiffs asked an instruction, if the jury believed that Edwards & Stewart purchased the gold which was afterwards seized, with the money of Donnell, and on his account, and subsequently to the death of Pawson, that the defendant could not set off the value of the confiscated gold against their claim. The instruction being refused, the plaintiffs excepted. 11. The defendants asked the court to instruct the jury that if Pawson purchased the gold or silver; or if, as his agents and succeeding to the possession of the joint funds of Pawson and Donnell, Edwards & Stewart purchased the gold and silver, which was subsequently seized, then Pawson and his representatives should bear the loss. The instruction was given, and the plaintiffs excepted. 12. The first portion of the instruction asked and given appears from the opinion; the latter part was: The defendant prays that the defendant's having received from Captain Lane, the successor of Captain Pawson in the command of the Chesapeake, the letters and invoices sent to him by Edwards & Stewart, is not, under the circumstances of the case, such a ratification of the act of purchasing and putting on board gold and silver by Pawson or his agents, as to throw the loss of it upon the defendant, and to authorize the plaintiffs to recover in this action. The instruction was given. The plaintiffs excepted.

Verdict and judgment for the plaintiffs for the sum of five thousand five hundred and ten dollars and forty-three cents. Both parties appealed.

Williams, district attorney of the United States, and Tuney, attorney-general, for Pawson's administrators, on the first bill of exceptions cited: 3 Stark. Ev. 1038; 2 Id. 453, 454, 447, 452;

Birch v. Depeyster, 3 Serg. & R. 359; *Senior v. Armitage*, Id. 71; *Cutter v. Powell*, 6 T. R. 320; *Zagary v. Furnell*, 2 Camp. 240; *Renner v. Bank of Columbia*, 9 Wheat. 582; *Jackson v. Union Bank of Md.*, 6 Harr. & J. 146; *Bank of Columbia v. Magruder's Administratrix*, Id. 172, 180 [14 Am. Dec. 271]; *Phill. on Ins.* 18; *Park*, 589, 630; *Marsh.* 226, 259, 270, 365, 375, 707; *Troll v. Wood*, 1 Gall. 444; *Winter v. Brockwell*, 8 East, 308. On the eighth bill they cited: *Peake's Ev.*, *Norris' ed.* 416; *Winchester v. Hackley*, 2 Cranch, 342; 2 *Stark. Ev.* 642, 643; *Farnsworth v. Garrard*, 1 Camp. 38. On the third bill of exceptions: 1 vol. *Laws of U. S.* 272. On the fourth bill of exceptions: *Elting v. Bank of United States*, 11 Wheat. 75; 1 *Liv. on Agency*, 69 to 180; 2 Id. 214, 215; *Kendrick v. Delafield*, 2 Cai. 67, 72; *United Ins. Co. v. Scott*, 1 Johns. 111, 115; *Abbott*, 270; *Thorne v. White*, 1 Pet. Adm. 176, note; *Rice v. The Polly and Kitty*, 2 Id. 420. On the fifth bill of exceptions: *Cutter v. Powell*, 6 T. R. 320; *Abbott*, 427; *Hart v. The ship Littlejohn*, 1 Pet. Adm. 115, 118, 119, 121; *Pothier*, 116, 117, 118; *Pordage v. Cole*, 1 Saund. 320, note 4; *Campbell v. Jones*, 6 T. R. 570; 2 *Stark. Ev.* 642; 1 *Pow. on Con.* 267. On the second bill of exceptions: *Laidlaw v. Organ*, 2 Wheat. 178, 183, 195; *Elting v. Bank of United States*, 11 Wheat. 75; 1 *Liv. on Agency*, 71; *McIntyre v. Bowne*, 1 Johns. 238, 259; *Lamnott v. Bowly*, 6 Harr. & J. 522, 524. On the ninth bill of exceptions: *Lamnott v. Bowly*, 6 Harr. & J. 522, 524; 1 *Stark. Ev.* 399; *Elting v. Bank of United States*, 11 Wheat. 76. On the sixth bill of exceptions: *Elting v. Bank of United States*, 11 Wheat. 75; *Abbott*, 489, 434; *Val. Com.*, tit. 4, art. 3; 2 *Bro. C. & A. L.* 533; *Pothier*, 120, 126; *Nap. Code*, art. 250; *Morrison v. Galloway*, 2 Harr. & J. 461 to 468; *Sigard v. Roberts*, 3 Esp. 71; *Knight v. Crockford*, 1 Id. 192, 193; *Campbell v. Jones*, 6 T. R. 570; *Hoyt v. Wildfire*, 3 Johns. 518; *Sullivan v. Morgan*, 11 Johns. 66.

C. C. Harper, R. B. Magruder, and Wirt, contra, on the first bill of exceptions cited: *Poth. on Mar. Cont.* 13, 14, 32, 135; *Abbott on Shipping* 137 (119), 557; 3 *Stark. Ev.* 998, 1036. On the second bill of exceptions the same authorities were referred to, as well as, *Macbeath v. Haldimand*, 1 T. R. 180, 182; *Ferris v. Walsh*, 5 Harr. & J. 308. On the third, fifth, and seventh bills of exceptions: *Portage v. Cole*, 1 Saund. 320, note 4; *Furnival v. Crew*, 9 Mod. 455, 459; *Cutter v. Powell*, 6 T. R. 320; *Cook v. Jennings*, 7 Id. 381. On the eighth bill of exceptions: *Abbott*, 482; 1 *Com. on Cont.* 221, 222; *Campbell v. Thompson*, 2 Serg. & Low. 481; *Locke v. Smith*, 10 Johns. 250;

Act of 1785, ch. 46, 47; *Clarke v. Magruder*, 2 Harr. & J. 77; *McFadon v. Baltimore Ins. Co.*, 4 Id. 45. On the sixth bill of exceptions: Pothier, 135. On the ninth bill of exceptions: *Key's Executor v. Parnham*, 6 Harr. & J. 418; *Davis v. Davis*, 7 Id. 36.

By Court, DORSEY, J. Of the refusal of the court to grant the instruction prayed for, which forms the ground of appeal on the appellant's first bill of exceptions, we entirely approve. Had the instruction been given it would have been a palpable invasion of the unquestionable and exclusive right of the jury: that of deciding on facts, of which contradictory testimony is adduced. The appellees "had offered in evidence that it was the usage among ship owners and masters, not to charge freight where the ship was in ballast, for any articles shipped by the captain on his own account." The appellant then "offered in evidence that there was no usage as above stated, and that the captain was liable to freight to the owner, like any other person, if he chose to exact it." In such a state of the proof, the court could not do otherwise than reject the prayer, calling on them to decide a fact thus controverted.

In the appellant's second bill of exceptions are involved questions of great magnitude to the commercial world, and of much intrinsic difficulty; and we regret that we are called to the decision of these questions, without proof of commercial usages upon the subject. In the argument it is conceded by both parties, that the owner of the ship and cargo has the uncontrolled power of breaking up or changing the voyage, but they differ most widely as to the consequences which would ensue, and the nature of the responsibilities to which the owner would thereby be subjected. For the appellant it was contended that this well-established prerogative of the ship owner, entered into the contemplation of Donnell and Pawson, who contracted in reference to it. That upon its exercise no new liabilities were created; the Canton privilege no longer formed any part of the contract; nor had Pawson any claim to indemnity for its loss. This is assuming much broader ground than was occupied by the prayer to the court below, which appears predicated on the admission of Pawson's title to recover, but for his alleged voluntary relinquishment of his right. The appellees, on the other hand, insist, that upon the change of the voyage, Pawson was not only entitled to claim an indemnification for the injuries thereby sustained, but the full value of the Canton privilege, exempt from all the casualties to which it was naturally liable, and also the

whole compensation, stipulated as an allowance to the supercargo, whether the services for which it was equivalent were ever rendered or not, all of which, on the part of the appellants, is strongly controverted. The principles contended for by each party, are, perhaps, stretched further than reason or justice would sanction or public policy requires. And it may readily be imagined, how the counsel on both sides, if yielding to the impulse of their clients' interest, would have changed hands in the argument, had a new modification been given to the facts in the case, which, whilst it varied its aspect, would not in the slightest degree have removed it from the operation of the principles now attempted to be applied to it. Suppose, for example, the voyage contracted for had been from Baltimore to London, and thence home, with a cargo of dry goods, the stipulated compensation of Captain Pawson, in addition to his monthly wages, being three hundred dollars, but no privilege. After the sailing of the vessel, owing to a sudden depression in the price of dry goods, Donnell changes the voyage; directs that eight thousand doubloons be taken on board at London; be transported to Coquimbo; there converted into a full cargo of copper, which was to be sold at Canton, and the proceeds of sale there invested by Pawson in a suitable invoice were to be brought home by him, in the Chesapeake to Baltimore. Under such circumstances would Pawson's counsel, as they do now, insist on the compensation fixed in the original contract, where the emoluments incident to the substituted voyage, by universal usage of trade, were twenty times as great as those which belonged to the original? Impelled by the interests of their client, they surely would require the accustomed reward for the services rendered. Whilst the counsel for the appellant, if influenced exclusively by his interests, would insist on his discharge, upon payment of the sum specified in the agreement. But suppose another case, slightly variant in circumstances, but the same in principle: A ship owner in Baltimore, for a fixed compensation (say three hundred dollars) employs a captain to navigate his vessel to the Havana, there to sell his outward and purchase a return cargo. Before she reaches the mouth of the Chesapeake her destination is changed; she is ordered on a trading voyage that may last for years; she is to double Cape Horn and return by the Cape of Good Hope; would it be attempted to limit the reward for the captain's services to the sum mentioned in the original agreement? But to present the question on facts more immediately before us, suppose the

Chesapeake, on her originally destined voyage, before she had passed the waters of Maryland, had been ordered to Norfolk, there to sell her cargo and return to Baltimore, could it be pretended that Pawson would, in such circumstances, have been entitled to the two thousand dollars and the undiminished value of the Canton privilege?

If the rule contended for either by the appellants or the appellees be a good one, it must work both ways, as well to cases where the length of the voyage is increased as where it is diminished. In its operation it would always work injustice to one party or the other; and in the latter case, it would, in effect, annihilate that acknowledged and invaluable right in ship owners of controlling the destination of their property; as its enjoyment would be visited by penalties more than equivalent to the losses apprehended from the original, or benefits anticipated from the substituted voyage. Reason, justice, and public policy are never to be lost sight of in the construction of commercial contracts, in unison with which it would be difficult to reduce the rules insisted on by the parties to this controversy. The principles which should govern cases like the present, according to our views (in the absence of all commercial usage on the subject), are these: If, by the exercise of this important privilege, a special injury is done to the captain or supercargo, the ship owner must bear the loss; he must make a reasonable indemnity. If, on the contrary, by the change of voyage, the captain or supercargo be necessarily discharged from the performance of all the duties for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished. If a part of the duties has been executed, then such a proportion of the stipulated compensation should be allowed, as appears just, on comparing the services rendered, under the voyage originally contemplated, with those which remain unperformed. For the interpolated part of the voyage the usual compensation must be paid. The parties should be placed, as nearly as may be, in the same condition in which they would have stood, had a previous contract, for the voyage as changed, been entered into between them. To all the customary emoluments of a captain or supercargo, on such a voyage, are those officers respectively entitled.

The county court, we therefore think, erred in the appellant's second bill of exceptions, in refusing to instruct the jury as prayed, that "the plaintiff (below) is not entitled to any compensation, for the alleged loss of privilege of bringing home the

twenty-five tons from Canton;" that being a privilege so inseparably connected with the vessel's destination to Canton, that upon its ceasing, *as it did*, to be one of the *termini* of the voyage, the privilege of necessity expired with it.

With the opinion of the court below in the third bill of exceptions we concur. The alleged misconduct of the captain, having produced neither injury nor inconvenience to the appellant, forms no defense to the present action. According to the views before expressed by us, the county court were in error in their refusal to grant the prayer in the appellant's fourth bill of exceptions, and also in the opinion and direction they thereon gave to the jury; and in conformity with the same views, we approve of their refusal of the opinion and direction prayed for in the appellant's fifth bill of exceptions.

The decision made by this court on the second bill of exceptions, renders it unnecessary for them to examine the opinion of the county court in the appellant's sixth bill of exceptions, as by that decision the appellant's prayer becomes wholly immaterial and irrelevant to the issues in the cause; and let the determination of the county court be what it might, it would furnish no ground for reversing their judgment. The same may be said in relation to the appellant's ninth bill of exceptions.

Of the refusal of the court below to grant the prayer in the appellant's seventh bill of exceptions we in part approve and in part disapprove. They were wrong in refusing to instruct the jury that the plaintiffs below were not entitled to recover the said sum of two thousand dollars; but were right in refusing to instruct the jury that they were not entitled to recover "any part thereof."

We concur with the county court in their refusal to grant the appellant's prayer contained in his eighth bill of exceptions.

There being cross appeals in this case, it now becomes necessary to consider the exceptions on the part of the appellees. It has been attempted to sustain the opinion of the county court in the appellees' first bill of exceptions, on the ground that Edwards & Stewart were the agents, not of Donnell, but of Pawson, and that he only must be answerable for their acts. With this doctrine, to the extent to which it is urged, we can not concur. It is in proof, that it was the known and necessary custom of trade at Chili and at Coquimbo, in the business in which Pawson was engaged, to employ agents on shore, such as Edwards & Stewart. That the selection of such agents, in this case, was not made *bona fide*, and with discretion, there is no

insinuation. The consequences of the neglect, omissions, or misconduct of Edwards & Stewart, in their agency, not imputable to Pawson, must be borne by Donnell; in fact, they are his agents, though appointed by, and under the immediate control of Pawson. For their acts, therefore, after Pawson's death, not flowing from any instructions previously given by him, in relation to Donnell's funds, they only, and to him alone, are answerable. This doctrine is fully sustained by the opinion of this court in the case of *Jackson v. The Union Bank of Maryland*, 6 Harr. & Johns. 150, and by the late decision of Judge Hallowell, before a special jury, in the district court of the city and county of Philadelphia. In refusing, therefore, to give the instruction prayed for, we think the county court erred. The prayer in the appellees' second bill of exceptions being in the alternative, the court below were right in instructing the jury, that if Pawson in his life-time made the investment in gold, he must bear the loss; but in the instruction given on the latter branch of the alternative, we conceive the court were wrong, upon the grounds assumed by us in the consideration of the appellees' first bill of exceptions, it being a question, under all the proofs and circumstances of the case, fairly open for discussion before the jury, whether the purchase of the gold was made under any instruction or authority from Captain Pawson. By their decision, they have determined that matter of fact in the affirmative, and consequently overleaped one of the barriers interposed between the court and the jury.

The first branch of the third exception of the appellees is inaccurately drawn; and if construed according to its obvious import, might have been rejected by the court for irrelevancy to the matters in issue before them. It prays an instruction to the jury, "that the plaintiff (below) is not entitled to recover of the defendant the amount of any gold or silver, which the said Pawson, or his agents, the said Edwards & Stewart, may have put on board the Chesapeake, of their own accord, and without the knowledge, consent, or orders of the defendant (below), and which may have been afterwards seized by the government of Chili, and confiscated as having been attempted to be exported contrary to the laws of the land." The plaintiff did not claim to recover the amount of any gold or silver; on the contrary, the gist of the controversy was his disclaimer of all interest in the gold or the funds with which it was purchased. The prayer was therefore inapplicable to the issue. But give to the exception that construction which has been ascribed to it in the argu-

ment: that it presents the question whether the amount of this gold could by the jury be discounted from any claim which Pawson might have upon Donnell, and the prayer is too wide to be gratified *in extenso*. If the investment in gold was made by Pawson in his life-time, or in obedience to his directions, then the discount contended for should have been sanctioned by the court; but if the investment was the act of Edwards & Stewart, without orders from Pawson, then the loss of the gold shipped must fall upon Donnell. The instruction of the county court embraces both alternatives, and is therefore erroneous. In their opinion, on the latter part of this exception, regarding the ratification by Donnell, of the purchase and shipment of the gold, we concur with the county court. Having assented to the decisions of the court below, contained in the appellant's first, third, fifth, and eighth bills of exceptions; but dissented from those in the appellant's second, fourth, and seventh bills of exceptions; and having dissented from their opinions in the appellees' three bills of exceptions:

Their judgment is reversed, and a procedendo awarded.

TIERNAN v. POOR.

[1 GILL & JOHNSON, 216.]

WHERE THE FACTS CHARGED IN THE BILL were admitted to be true, and no replication was introduced, but the parties agreed to submit the cause on the pleadings, the question to be decided is, whether the proceedings of the defendant, be they a plea or an answer, are sufficient in law to bar the plaintiff's claim.

SPECIFIC EXECUTION OF A CONTRACT in writing for the transfer of property will be decreed in equity as between the parties, although some circumstances to give it legal validity are omitted, provided it contain proper and apt terms whereby the intention of the parties can be clearly ascertained.

THE PLAINTIFF'S CLAIM TO RELIEF IN EQUITY must appear from the pleadings. The style and character of pleading in equity are of a more liberal cast than those of other courts.

APPEAL from a decree of the chancellor dismissing complainant's bill in equity. The facts appear from the decree of the chancellor and from the opinion of this court. An agreement signed by the counsel for the respective parties was as follows: "It is agreed in this case that the chancellor may take the papers and give a final decree—the counsel for both parties considering that the questions of law connected with it having

been fully discussed before his honor the chancellor, in a late case against the same defendant, it is unnecessary to discuss them again."

Bland, Chancellor, delivered the following decree: From the whole proceeding the case appears to be substantially no more than this. The plaintiff, to secure a debt due to him, obtained a mortgage of certain property from Dudley Poor and wife, who, by their plea, allege that prior thereto the mortgaged property had been conveyed to Columbus O'Donnell and John H. Poor, in trust for certain uses as in that deed mentioned, and therefore that Dudley Poor and wife had no right or power in equity to make and execute the mortgage relied on in the bill. The plaintiff has admitted the sufficiency of the plea by replying to it. And the truth of the facts therein stated, which alone has been put in issue, is clearly established by the proceedings in the cause. The plea covers the whole substance and merits of the plaintiff's case, and consequently, being fully sustained in law and fact, puts an end to it altogether. Decreed that the bill of complaint of the complainant be dismissed with costs.

From this decree the complainant appealed. It was agreed that "the plea to the original bill shall be considered as plea to the amended bills, the appellant reserving all objection to the plea itself, both in form and substance, and not admitting it to be a plea at all."

Gill, for the appellant.

Winchester, contra.

By Court, ARCHER, J. It will not be necessary, in this case, to determine whether the defense of the defendant is partly an answer and partly a plea in bar, or whether it is a plea in bar supported by an answer, or, if a plea, whether it is overruled by the answer. These questions not necessarily arising on the record, no replication has been filed, and the cause has been set down for hearing by agreement of counsel upon the proceedings in the case; if it be an answer, upon bill and answer; if a plea, then upon the bill and plea; in either case, all the facts set forth in the bill are admitted to be true, not by setting the cause down for hearing, but by the pleadings in the cause, and if the defense be in fact a plea, the cause having been set down for hearing, the question is submitted on its legal sufficiency to bar the remedy which the complainant seeks.

The facts of the case appear to be, that Dudley Poor was in-

debted to Luke Tiernan in the sum of six hundred dollars for rent in arrear; that for the purpose of securing the amount due, Tiernan levied a distress upon the goods of Poor; that to relieve his property from this lien thus acquired by Tiernan, Poor and wife agreed with him that they would execute the paper purporting to be a mortgage, filed with the proceedings, and Tiernan, in consideration thereof, agreed to give up his distress; that upon the fulfillment of the agreement on the part of Poor and wife, the goods levied upon were given up, and his lien by distress surrendered; that the property upon which the mortgage operated had belonged to Mrs. Poor, and had been conveyed by a deed of trust on the twenty-fourth of August, 1816, by Poor and wife to Columbus O'Donnell and John H. Poor, for the sole and separate use of Mrs. Poor during life, and in no wise answerable for his debts and engagements, with a power to her to sell, convey, and dispose of absolutely, in such manner as she might think proper to direct, without the concurrence of her husband; and from and after her decease, such part of the property as should be left undisposed of by her deed or contract, was conveyed in trust to her children and their heirs as tenants in common.

In the case of *Price and Nesbit v. Bigham's Ex'rs*,¹ the question was presented, how far it was competent for a married woman, by contract under seal, to charge the payment of a debt on her real estate, which was settled on her by a deed of trust for her separate use, with a power to sell and convey and absolutely to dispose of the same, by a deed duly executed by her, her coverture notwithstanding, and in delivering their opinion on this point, the court after stating that by the express terms of the trust she might pass her lands by deed, and they emphatically ask if this power exist, "how can the power to encumber it by mortgage or charge it by contract be denied to her?" The law allows her, notwithstanding her coverture, to part from her whole estate, upon the principle that in doing so she acts as a *feme-sole* as to her separate property, and upon the like principle, and to promote fair dealing, it must be conceded to her to charge and incumber it with her debts.

Whether the instrument of writing which forms the basis of this call, for the interposition of a court of equity, be in fact a mortgage, in the legal and technical sense of that term, in consequence of its not having been acknowledged by Mrs. Poor in the manner in which the acts of assembly require the acknowl-

1. 7 Harr. & J. 196.

edgment of *femes-covert* to be made, it is not necessary to determine, nor do we mean to intimate any opinion upon the subject; for the principle is a well-settled and familiar one, that where any instrument of writing is designed to operate as a transfer of property, and proper and apt terms are used whereby the meaning of the parties can be clearly ascertained, if some circumstances are omitted to give it legal validity, whereby it is deprived of its intended specific operation, a court of equity will set it up as a contract, or as evidence of a contract, and where the rights of innocent third parties would not thereby be effected, will, as between the parties to such instrument, carry it into specific execution, provided it be founded upon a valuable consideration: 2 P. Wms. 242. The deed in this case was clearly intended to be a mortgage to secure the payment of the complainant's debt, and was no doubt meant by the parties to be clothed with all the formalities and solemnities necessary to give it a legal and effective operation as such. Its design and meaning was to secure a particular debt, and to charge it as a lien on the wife's separate property. If it be deprived of legal validity for the want of a privy examination, we are still at liberty to look at it as illustrating and evidencing the agreement of the parties, and will coerce its execution according to that original design. Such a course would be demanded by the first principles of equity. For what could be more inequitable than to permit a party to escape from the fulfillment of his contracts by the mere omission of legal forms? in which omission, too, he may have been the sole actor, and in all cases a participator, and to allow him to reap the advantages from such omission, of all the consideration which constituted his inducement for entering into the contract.

A voluntary contract could neither be coerced in equity nor could advantages from it be obtained at law. And this leads us to the inquiry whether the consideration here was valuable, and of this there can not be a question entertained. The admissions in the cause show that the complainant surrendered his lien on the property distrained in consideration of the security, which he and all the parties to it believed he had obtained by the mortgage. It was the mere substitution by consent of one security for another, and if relying on the acts of the parties he has relinquished a certain indemnity, and is now to be told that his security taken in return, and intended as an equivalent, is gone, the result would be that equity would enable them to perpetrate a fraud.

But it is said that the wife was not benefited by any of these stipulations. It is not necessary that she should have been. It is sufficient, acting with her property as a *feme-sole*, that she contracted to pass it for her husband's debts, on condition that a benefit should be bestowed upon her husband, and that the creditor, seeking the benefit of this contract, and relying upon it, surrendered an existing security or advantage.

It is not meant to intimate in anything which has been said, that however the complainant might suffer by a reliance upon the conduct of those with whom he contracted, the execution of this contract could be enforced against the rights of disposition contained in the deed of trust. That would constitute a paramount law, governing and controlling every contract in relation to it, and it need be scarcely necessary to say, that no decree could pass against her to carry into effect any contract she might make, unless such contract were within the limits of her *jus disponendi*. This is a stronger case in favor of executing the contract, than was the case of *Price and Nesbit v. Bigham's Ex'rs*. There the power was to pass the estate by deed. Here, it is by deed or contract; embracing, by the latter term, the power to pass the estate by every kind of agreement known to the law, in which estates of the description mentioned in the deed of trust could pass. As a *feme-sole*, she had power to contract with any one, and to bind her estate, and to charge it with such contract. The power is sufficiently large and unrestrained to permit her to contract as security for others; and thus to pass her estate for the benefit of the principal, and to secure to his creditors their debts, she might voluntarily sell her lands, and with the proceeds pay her husband's debts. Why might she not, upon a consideration, incumber it for the the same purpose? There is nothing in the spirit and meaning of the deed of trust in opposition to such liberty; on the contrary, everything to uphold and confirm it; while it is cautiously guarded against liability for her husband's debts, her will and power over it is unrestrained. And if she chooses to exercise a kindness to her husband in discharging his debts, and thus charging her lands upon a sufficient consideration, there is clearly nothing in the intention of the settlement which forbids it. She was never intended to be placed in a state of pupillage with regard to her property, but left free to act as she pleased with regard to it, as fully and as perfectly as if she had been a *feme-sole*, and as if she had the legal title; nor are we bound, in order to give efficacy to her acts, to see that she has sought the

counsel of her friends, or solicited the permission of her trustee; such a limitation would restrict her will, in violation of the essence and spirit of the power. It is supposed that the allegations in the bill do not set up a proper foundation for the interposition of a court of equity. The plaintiff's title to the assistance of the court must always be exposed by the pleadings; but the style and character of pleading in equity has always been of a more liberal cast than that of other courts, as misleading in matter of form has never been held to prejudice a party, provided the case made is right in matter of substance, and supported by proper evidence: Cooper Eq. Plead. 7, 8.

The allegations then contained in the original and two amended bills, are in substance these: That the property prayed to be sold was conveyed to trustees in trust for the separate use of the wife of Dudley Poor, setting out, in substance, the uses and trusts to which the property was subjected; it then avers the existence of a debt due from Poor to Tiernan, that Tiernan had surrendered his lien on the property of Poor, in consideration of the execution of a mortgage by Poor and wife, on the lands of the wife thus conveyed in trust, which lands thus mortgaged, are prayed to be sold for the satisfaction of the debt. According to our views, these averments make out a clear case for equitable interposition. In point of form, it may not have been strictly correct to treat the instrument of writing in controversy as a legal mortgage, as it seems to have been done in the original bill. As such it may not be clothed with the necessary legal attributes. If it be not thus clothed, it is, at all events, clearly a contract which equity will treat as a mortgage, and as between these parties, so far as concerns this suit, liable to all the incidents of a strictly legal mortgage, as much so as if all the formalities of acknowledgment, privy examination, and registration had been pursued.

Entertaining the views we do, we can not but declare, that in substance, the allegations are correct and sufficient, and the equity clear and unquestionable.

The decree of the chancellor is reversed.

POWER OF EQUITY TO PERFECT OR ENFORCE DEFECTIVELY EXECUTED OR ACKNOWLEDGED INSTRUMENTS OF A MARRIED WOMAN.—By the common law, a *feme-covert* could not, with or without the consent of her husband, execute a valid conveyance or deed of her real estate. The wife's deeds of realty, except of such as was limited to her separate use, were, at common law, nullities. The only way in which a *feme-covert* could, at common law, convey her real estate was by uniting with her husband in levying a fine. Statutes of the several states of the Union have enlarged the powers of the wife

in disposing of her realty; but if the directions prescribed by these statutes are not observed in regard to the execution of the conveyance, it can have no other efficacy than at common law. Quite early in the history of our jurisprudence, the power of chancery to enforce the agreement of a married woman to convey was discussed: *Butler v. Buckingham*, 5 Am. Dec. 174; S. C. 5 Day, 492. The defendant, Mrs. Buckingham, had, with the consent of her husband, Mr. Buckingham, agreed, for a valuable consideration paid to her, to sell to the plaintiffs a lot of land in which she had an interest by virtue of a former marriage with one Bryan, then deceased, and to quitclaim to the plaintiffs her right of dower. Mr. and Mrs. Buckingham also gave a bond to the plaintiffs, reciting that Mrs. Buckingham had bargained and sold to them the lot in question, and conditioned for the execution of the quitclaim deed to dower and of warranty deeds to the plaintiffs, by the children of Mrs. Buckingham by her former husband, on their arriving at maturity. The plaintiffs entered into possession, and held the same for twenty years, making improvements. After the death of Buckingham, Mrs. Buckingham refused to execute the quitclaim deed, but commenced an action at law to recover her right of dower. The plaintiffs then filed their petition, praying an injunction against the proceedings at law; or that the title of the land might be passed to the plaintiffs. Judge Ingersoll, with whom the other members of the court concurred, considered at length the power of chancery to enforce the contracts of a married woman relative to her realty, and in the conclusion of his opinion, observed: "Not one authority from the English books has been produced, and I presume none can be produced, where a court of chancery has enforced the contract of a *feme-covert* against her in a case circumstanced as this is, and in the manner prayed for in the petition. It strikes me that the whole system of the common law of England is opposed to the doctrine contended for by the petitioners. It is a fundamental principle of that law, that the contract of a *feme-covert* is absolutely void, except in the instance of conveying her estate by fine, duly acknowledged, or by some matter of record. In such case, also, she is privately examined, in order to ascertain whether such conveyance be voluntary on her part, and whether, in making it, she be uninfluenced and uncontrolled by her husband. How absurd, then, would it be to enforce such a contract to convey, made without any such examination! This would be saying that a *feme-covert* can not directly convey her estate, unless her free consent be obtained by a private examination; and yet she can contract to convey without such examination, and such contract shall be carried into execution. By this mode, the law with respect to a *feme-covert* and her real estate will be completely done away. But, as has been observed, the court of chancery in Great Britain never have proceeded on such absurd grounds. The old common law rule with respect to her contracts remains entire. The chancery courts mean not to trespass on this rule. But when it became the fashion to settle estates to the separate and sole use of the *feme-covert*, chancery considered these estates as belonging to her solely, without any right therein, or control thereof, on the part of the husband. As to such estates, she was considered as a *feme-sole*, and her contracts, with respect to them, as binding. As to all other estates not settled to her separate use, no contract of hers has been held as binding on them."

This decision indicates the power possessed by courts of equity at common law to enforce the contracts of a married woman. It is cited approvingly in the different state courts of this country, and by the courts of Connecticut in subsequent adjudications, as appears from the note in 5 Am. Dec. 183. Whether or not the powers of chancery are enlarged by the statutes of the various states so as to enable it to enforce contracts of married women, not

executed in accordance with the directions of the statutes, has been often considered, and as often answered in the negative.

Martin v. Dwelly, 6 Wend. 9, in the court of errors of New York, presented the question squarely, "whether a deed of a *feme-covert*, not executed and acknowledged according to the provisions of the statute, 1 R. L. 369, and therefore void and inoperative at law, is to be considered and treated in a court of equity as a valid agreement to convey, the specific performance of which will be decreed as against the *feme-covert* or her heirs." The facts were that a married woman executed a deed of lands, together with her husband, conveying realty belonging to the wife; the consideration money was paid; but the deed was not acknowledged by the wife pursuant to the statute. In the course of an elaborate opinion, Justice Sutherland, after advertising to the common law powers of a wife to convey her real estate, says: "Our statute declares that no estate of a *feme-covert* residing in this state shall pass by her deed without a previous acknowledgment made by her before a proper officer apart from her husband, that she executed such deed freely, without fear or compulsion of her husband: 1 R. L. 369. This provision, it will be observed, is an enlargement, and not a restraint of the common law powers of a *feme-covert*. It authorizes a less formal mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same power and effect as a fine, but if not acknowledged according to the directions of the statute, it declares that no estate shall pass by it. It leaves it as it would have stood at the common law, if the statute had never been passed, absolutely void and inoperative. It was conceded that such must be the consequence at law; but it was contended that a court of equity would consider it as an agreement to convey, and if it was shown to have been voluntarily made for a valuable consideration, would compel the wife or her heirs specifically to perform it. This doctrine appears to me to be unsound in principle and unsupported by any color of authority." After reviewing many decisions, *Butler v. Buckingham*, *supra*, among others, and pointing out the absurdity of enforcing as a contract to convey that which was void as conveyance by reason of its defective acknowledgment, the justice concluded: "If an absolute sale consummated by a deed is void unless such deed is acknowledged in the mode prescribed by the statute, it is impossible that a contract to sell and convey at some future time should be valid."

A late decision in Maryland, *Grove v. Todd*, 41 Md. 633, recognizes the same principles. The appellants, complainants below, filed their bill to have declared a nullity a deed executed by one of the appellants, a married woman, and her former husband, to the defendants, in consideration of love and affection; and to have assigned to appellants the dower right in the land. The deed appeared to have been acknowledged in one county before a justice of the peace of another county. Judge Alvey, delivering the opinion of the court, said: "The acknowledgment is therefore essential to the validity of the deed as a legal conveyance, and not only so, but it must be before the proper officer; for if made before a justice of the peace out of the county or city for which he was appointed, the acknowledgment is as inoperative and void as if the person taking it was wholly without official character: *Byer v. Etnyre*, 2 Gill, 151. Whatever may be the effect and operation of the deed, without proper acknowledgment, as against the husband, it is certain that the wife could only be divested of her estate by proper and legal acknowledgment, and a deed not so acknowledged is wholly inoperative as to her, and is to be treated as if she had not been a party to it: *Johns v. Beardon*, 11 Md. 465; *Steffey v. Steffey*, 19 Id. 5. The deed be-

fore us, being without acknowledgment, was utterly null and void, as against the wife, both at law and in equity, and she was under no obligation, and could not be compelled, to rectify it so as to give it operation and effect: *Gebb v. Rose*, 40 Md. 387; *Drury v. Foster*, 2 Wall. 24."

These principles were applied to a somewhat different state of facts in *Townesley v. Chapin*, 12 Allen, 476, 478. A bill was filed to obtain a decree for the execution of a new deed under the following circumstances: The defendant, while a married woman, executed to the plaintiff a quitclaim deed of an estate held by her as sole and separate property, in which conveyance the husband did not join nor give his written assent thereto. Under the local statute the assent of the husband in writing, or his joining in the conveyance, was essential to the validity of the wife's conveyance of her sole and separate property. The husband soon after died. Says Judge Foster: "It is not contended that the deed actually executed was otherwise than utterly void; its admitted invalidity is the foundation of the supposed equity which the plaintiff now invokes the aid of the court to enforce. Nor is it claimed that while the husband lived there was any foundation for a suit in equity against him to compel his written assent, and thereby to perfect the void conveyance. But by reason of his death the plaintiff insists that he is entitled to require from the defendant a new conveyance, which, as a *feme-sole*, she is now competent to execute. In our opinion, however, the written assent of the husband is as indispensable to the validity of an executory agreement by a married woman to convey her real estate, as to an executed conveyance thereof. The restrictive clause of the section requiring the husband's written consent is as broad as that which confers the power to convey. It would be a preposterous construction to hold that a married woman might alone enter into a binding agreement to do that which she could not actually do without her husband's concurrence. The power to make a contract to convey is not expressly given, but derived inferentially from that to convey: *Baker v. Hathaway*, 5 Allen, 103. Upon what principle can it be maintained that an instrument wholly void upon its execution is made valid and capable of enforcement in equity by the contingency of the husband's death? The deed when executed was inoperative for want of power on the part of the grantor. The removal of the disability of coverture can not possibly render effectual and binding a contract or conveyance made while that disability continued, and by reason thereof originally a mere nullity. Whether the section under consideration be considered as one conferring a power not previously possessed by married women, but on condition of the husband's written consent, which is its form; or as a protective enactment requiring such written consent for the benefit and security of the wife's interests, which is its substance; in either view, its effect and construction must be the same. *Jewett v. Davis*, 10 Allen, 68, can not be distinguished from the present case. There relief was denied because the wife could make no valid contract. We deny it now because she has made none. The principle is the same. A court of equity has no more jurisdiction than a court of law to recognize and give effect to instruments inoperative for want of compliance with a condition made by statute prerequisite to their validity." So, also, in *Purcell v. Goshorn*, 17 Ohio, 105; *Jewett v. Davis*, 10 Allen, 68; *Dickinson v. Glenney*, 27 Conn. 104; *Lane v. McKeen*, 15 Maine, 304; *Gebb v. Rose*, 40 Md. 393.

Nor has equity any power to supply those omissions in a married woman's conveyance, and add those requisites which the statute makes essential to the validity of her deed. In *Gebb v. Rose*, 40 Md. 387, the husband did not join the wife in the execution of a deed of her realty, as provided by the

statute. It was urged in the argument that as the imperfections of the instrument were occasioned by ignorance and mistake, a court of equity was competent to correct the instrument and to give it such effect as the parties intended it should have. "The mistake here," said Judge Alvey, for the court, "if it can be called such, was one of law simply; a want of knowledge as to what the law required to make the deed good and effective. Such mistake or want of legal knowledge forms no proper ground for the assistance of a court of equity, in the absence of actual fraud and imposition. Besides, the principle is well established and results from the propositions before stated, that where there is an omission of some statutory requirement in the deed of a *feme-covert*, essential to its validity, the mistake can not be corrected by the court: *Dickinson v. Glenney*, 27 Conn. 104; *Grapengether v. Fejerbary*, 9 Iowa, 163; *Martin v. Dwelly*, 6 Wend. 9."

Dickinson v. Glenney, 27 Conn. 104, presents a careful consideration of these principles, the court coming to the same conclusion as the Maryland courts, upon the power of equity to perfect defective instruments of married women. Among other reasons Chief Justice Storrs advances, is: "But, at the threshold of this inquiry we are met with the established doctrine that equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying, under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void, even as between the parties to it; that it will not fabricate for contracting parties those essential ingredients of a contract without which, in the eye of the law, there subsists no valid contract whatever. In such cases the intent of parties to conform to the enactments or rules of law will not avail them; and having fallen short of its requirements, they have consummated no agreement at all." So also, *Carr v. Williams*, 10 Ohio, 305; *Drury v. Foster*, 2 Wall. 24.

A similar view of this question was adopted by the supreme court of California, in *Leonis v. Juana Lopez de W. de Lazzarovich*, decided June 4, 1880. It was there attempted to correct an alleged mistake in a deed executed by the defendant and her husband to the plaintiff, it being claimed that certain land specially excepted from the operation of the deed, should have been conveyed by the deed. O. J. Morrison, after reviewing the evidence and considering whether a court of equity will ever reform a written instrument, where there is a substantial conflict in the evidence, expresses the following opinion regarding the question now under consideration: "The defendant is a married woman, and it is a conveyance made by a *feme-covert* which is sought to be reformed. * * * The question here arises, can a court of equity reform the deed of a married woman? Was it within the equitable powers and jurisdiction of the court below to decree, as it did, that the defendant should, within a certain time fixed by the decree, execute to the plaintiff her deed conveying lands not described in any deed or other written instrument, and in case she made default, that such deed should be executed by the clerk of the court? Whatever rights and powers a married woman has or can legally exercise in the disposition of her property are matters of statutory regulation. At common law, she possessed no power to convey her lands, except by fine and recovery, and that law constitutes the basis of our jurisprudence; and rights and liabilities must be determined in accordance with its principles, except so far as they have been modified by statute." The learned chief justice here reviews a large number of authorities, citing, among others, *Butler v. Buckingham*, 5 Day, 492; S. C., 5 Am. Dec. 174, and also considers to what extent the disabilities imposed by the common law upon married women in the conveyance of their real property have been removed

by legislative enactment in California, and then concludes as follows: "We have thus seen that there is but one mode by which a married woman can convey her separate estate, and that is prescribed by statute. All the cases hold that the provisions of the statute must be substantially complied with; and if the certificate of acknowledgment is insufficient, the conveyance is absolutely void. * * * A *feme-covert* can only be bound by a written instrument, executed and acknowledged by her in the manner prescribed by law, and it is not competent for a court of equity to supply defects in description, any more than it can reform a certificate of acknowledgment. That the latter can not be done has been expressly decided in the case of *Barrett v. Tewksbury et al.*, 9 Cal. 13; and that the former cannot be done is equally clear upon principle and authority."

From these adjudications, the proposition seems deducible, that by reason of the disabilities attaching to the status of a married woman, such contracts as she is permitted by law to make must be executed conformable to the requirements of the law; otherwise they are void in equity as well as at law, and cannot be perfected in equity nor enforced against her. The rule, in some instances may work great hardship upon those who have had dealings with married women; but it is a hardship which may be avoided by caution on the part of those interested in obtaining a binding agreement from the woman.

TURNER v. EGERTON.

[1 GILL & JOHNSON, 430.]

AN ADMINISTRATOR'S REMEDY IS IN EQUITY where, having been compelled to pay a debt of his decedent of which he was not aware when he distributed the estate, he seeks to recover from the distributee the amount of such debt.

THAT THE LAW RAISES AN ASSUMPSIT against the person benefited by the payment of money is not universally true. A stranger can not make a man his debtor against his will, by paying off such man's indebtedness.

ONE COMPELLED TO PAY THE DEBT OF ANOTHER may recover the amount from that other in an action for money paid.

APPEAL. Assumpsit brought by the appellant. Plea, non-assumpsit and joinder. The case appears from the opinion.

Stonestreet, for the appellant.

C. Dorsey, contra.

By Court, BUCHANAN, C. J. This is the case of an administrator who, thinking he has paid off all the debts of the deceased, delivered over to the children of the deceased the proportions of the residue of the personal estate, to which they were respectively supposed to be entitled as distributees. But being afterwards compelled by a recovery at law to pay a considerable debt due by the deceased, of which he was not at the time aware, and having in part paid the debts of the deceased

out of his own private funds, brought his suit against one of the distributees to recover a just proportion of the amount so recovered against, and paid by him. The counts in the declaration for matters proper chargeable in account, money lent and advanced, money had and received, and on an *instimul computassent*, are entirely out of the question, there being no evidence in the cause in any manner or sense applicable to either of them; and the question is, whether, under the circumstances disclosed, the plaintiff is entitled to recover on the count for money laid out and expended.

It has been urged that where one is benefited by the payment of money by another, the law raises an assumpsit against the party benefited, in favor of the party paying the money, but the universality of that proposition is not admitted. A stranger can not, at his pleasure, make me his debtor, whether I will or not, by paying a debt due from me to another. Such a payment might ordinarily be deemed for my benefit, yet the law does not in such a case raise an assumpsit. If it were so, it would be to put every man who owed a debt at the mercy of an enemy, who might choose to make himself his creditor without his consent or authority, for the purpose of harassing and distressing him; and to deprive him of defenses which he might have had to a suit by his original creditor, but of which he would not be able to avail himself against such newly-created liability. It is true that where one is compelled to pay the debt of another, he may recover against him in an action for money paid, etc., upon the promise which the law implies, as in the case of money paid by a surety in a bond, which is considered as paid to the use of the principal, and may be recovered in an action against him for money paid, etc. But that is not this case. Here was no debt due from the distributee to the creditor of the intestate, no demand which could have been enforced at law against her; and the money paid by the plaintiff, though not voluntarily, but under a recovery against him in a suit at law, was in discharge of his own liability as administrator, and not of a debt due from the distributee, nor on account of his being placed in a situation of responsibility by any act of hers. It was not, therefore, a payment of money to her use, for which law will raise an implied promise of repayment, on account of there being in her hands a portion of the personal assets of the intestate. If in such a case as this an action at law could be maintained on the ground of an implied assumpsit, it would be in the power of fraudulent or negligent

executors and administrators, by covinously or carelessly suffering judgments to go against them, and constituting themselves creditors of legatees, and distributees without their knowledge or authority, so to change their predicament against their consent, as in suits at law instituted upon such implied promises, to deprive them of the benefit of defenses that might be accorded to them in proceedings in chancery against the funds in their hands, by the original creditors of the deceased, which would be of mischievous consequence to legatees and distributees. And it would be unjust to permit an executor or administrator, by thus constituting a legatee or distributee his debtor, without his consent or knowledge, to place him in a worse condition in relation to that debt than he stood in before; which would be the case if he could pursue him for the recovery of it, on an implied assumpsit, in a court of law instead of a court of equity, where alone he could have been called upon before, where equity is administered in a manner in which it can not be in a court of law; a court of law not being a fit tribunal to investigate and unravel accounts of executors and administrators, and not being so constituted as to be able to take into consideration, in the manner that a court of equity would, how the funds were in fact appropriated, and the mode in which they might and ought to have been applied. With this view of the subject, we think, with the court below, that the plaintiff is not entitled to recover, and that in bringing his action in a court of law he mistook his tribunal, and ought to have sought his remedy in a court of equity, where matters of the kind are properly cognizable, and the interests of all parties equally protected.

Judgment affirmed.

CRANE v. MEGINNIS.

[1 GILL & JOHNSON, 468.]

RELATION OF DEPARTMENTS OF THE STATE GOVERNMENT considered.

DIVORCES HAVING BEEN GRANTED BY THE GENERAL ASSEMBLY from the earliest times, can now be viewed in no other light than as a regular exercise of legislative power.

SUIT FOR ALIMONY is a remedy distinct from the proceedings for a divorce, and has been recoverable through the courts of justice.

A DIVORCED WIFE MAY RECOVER A MAINTENANCE suitable to her station in life and to the condition of her husband, by a bill in chancery.

AN ACT REQUIRING A HUSBAND TO PAY ALIMONY to a trustee for the maintenance of his wife, from whom such act divorced him, is an exercise of judicial power, and void.

APPEAL. Assumpsit to recover the sum of one hundred and fifty dollars, the first semi-annual installment directed by an act of general assembly to be paid by the defendant, Meginnis, to Crane, as trustee, for the benefit of Mrs. Meginnis, who was, by such act, divorced from her husband. Demurrer to the declaration and joinder. A *pro forma* judgment was rendered for the defendant.

Chambers, for the appellant.

Spencer, Bayly and Carmichael, contra, referred to 2 Burns Ec. Law, 434; 3 Bl. Com. 94; 1 Fonb. Eq. 90, note, 104; *Duncan v. Duncan*, 19 Ves. jun. 397; *Galmith v. Galmith*, 4 Harr. & McH. 477; Act of 1777, ch. 12, sec. 4; *Watkins v. Watkins*, 2 Atk. 97; 6 Art. Bill of Rights; 18 Id.; *Whittington v. Polk*, 1 Harr. & J. 236; *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304 to 307; 21 Art. Const.; Act 1676, ch. 21; 1678, ch. 18.

By Court, EARLE, J. A constitutional question is involved in the consideration of this case, and before we enter upon the solution of it, we will state some positions preliminary to the subject. The constitution of this state, composed of the declaration of rights and form of government, is the immediate work of the people in their sovereign capacity, and contains standing evidences of their permanent will. It portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise, and specifying that from the exercise of which it must abstain. The public functionaries move, then, in a subordinate character, and must conform to the fundamental laws or prescripts of the creating power. When they transcend defined limits, their acts are unauthorized, and, being without warrant, are necessarily to be viewed as nullities. If considered as valid acts, the distinction between unlimited and circumscribed authority is done away, the derivative exerts original power, and of constitutional law nothing is left but the name.

The legislative department is nearest to the source of power, and is manifestly the predominant branch of the government. Its authority is extensive and complex, and being less susceptible on that account of limitation, is more liable to be exceeded in practice. Its acts, out of the limit of authority, assuming the garb of law, will be pronounced nullities by the courts of justice, it being their province to decide upon the law arising in questions judicially before them, and upon the constitution as the paramount law; but this is more in fulfillment of their own

duty than to restrain the excesses of a co-ordinate department of the government. The check to legislative encroachments is to be found in the declaration that the legislative, executive, and judicial powers ought to be kept separate and distinct, and in the solemn obligations of fidelity to the constitution under which all legislative functions are performed.

With these general views of constitutional law, we proceed to consider the questions more immediately before the court. On the argument of the cause, the court's attention was directed to act of assembly passed in 1823, entitled, "An act for the relief of Mary Meginnis," which the appellee's counsel asserted to be in violation, in some of its provisions, of the constitution of the state. Should it be found to be so, the judgment of Kent county court will be affirmed, the appeal having been taken in a suit founded wholly upon this act of assembly. Whether the act is, then, an infringement of the constitution, is the main question to be determined by this court, and it rests upon the two following points: Is the enactment of the third section of the act of 1823, an exercise by the legislature of judicial power? Is the exercise by the legislature of judicial power, in the passage of a law, repugnant to the constitution?

The act of 1823 is an act of divorce, separating Mary Meginnis from the bed and board of her husband, and its third section is clothed in this language: "And be it enacted that the said Casparus Meginnis shall annually hereafter pay to John Crane, of Queen Ann's county, who is hereby made the trustee in that behalf, to and for the use and benefit of said Mary Meginnis, the sum of three hundred dollars in two equal installments; the first on the first day of March, and the second on the first day of September, in each and every year during the joint lives of the said Casparus Meginnis and Mary Meginnis, and the said trustee shall be authorized to institute suit in his own name for any installment which shall not be paid on the day on which the same is hereby declared to be due, and it shall be the duty of the court before whom the suit is brought to try the same at the term to which the writ is made returnable." This grant of an annuity is called a grant of alimony, and it is contended that after the legislative separation, it might have been recovered by the wife in the court of chancery, pursuant to the laws of this state, if her case merited the interference of the chancellor, and the circumstances of the husband justified the allowance of such a sum.

The investigation of this point led us into a general review of

the British law of divorce and alimony. From the research, it has appeared to us that they are both of judicial cognizance in the ecclesiastical courts of that country; that the divorce *a mensa et thoro* separates the parties for unfitness for the marriage state, and the separation is the remedy administered for the injury to the suffering party; that alimony is the maintenance afforded to the separated wife for the injury done her by her husband in neglecting or refusing to make her an allowance suitable to their station in life, and is treated as a consequence drawn from the divorce *a mensa et thoro*, and that each of those matrimonial causes is dependent upon different facts, and is redressed by different judgments, although both are within the jurisdiction of the same tribunal. In this state, the act of divorcing man and wife has been performed by the legislature, for the want, perhaps, of ecclesiastical authority to effect it, or borrowing, perchance, the power from the parliament of Great Britain, which sometimes granted divorces *a vinculo matrimonii*, for supervenient causes arising *ex post facto*, a thing that the spiritual courts could not do. However this may be, divorces in this state from the earliest times have emanated from the general assembly, and can now be viewed in no other light than as regular exertions of legislative power. The private acts passed for more than ten years back we have adverted to, and almost every divorce law has been found to be expressed in terms peculiar to itself. In some, the mere separation from bed and board is effected in the plainest and shortest way, as in the case of Francis B. Mitchell by the act of 1822, c. 138, and in the case of Sarah Kerr, by the act of 1824, c. 118, and in other acts separating the married parties, particular consequences of a continuing coverture are sedulously guarded against. In none, not even in the act of 1818, c. 203, referred to by counsel, is there anything like a provision for the future maintenance of the wife, graduated to the circumstances of the husband and the station in life of the parties, as the act of 1823 would appear to be. On the other hand, the suit for alimony in this state, as in Great Britain, is a distinct remedy from the proceedings to obtain a divorce, and for a series of years, the wife's maintenance has been recoverable through the intervention of our judicial tribunals. So early as the year 1689, in the case of *Galwith v. Galwith*, 4 Harr. & McHen. 477, it was asserted in the supreme court of the province, that alimony is only recoverable in chancery, or the court of the ordinary; and in the year 1777 the act of assembly was passed which expressly

authorized the chancellor to hear and determine all causes for alimony in as full and ample manner as such causes could be heard and determined by the laws of England in the ecclesiastical courts there. Since this last period, such causes have been continually acted upon by the chancellor, and in some instances appeals have been taken to the appellate courts and decided on by them. And we cannot permit ourselves for a moment to doubt that if Mary Meginnis, like Francis B. Mitchell and Sarah Kerr, had obtained simply an act of divorce, she might have recovered, having merits, a maintenance suitable to her station in life, and to quadrate with the situation of her husband, by a bill in chancery, or an application to the equity side of Kent county court. If she could have been thus redressed by an exercise of judicial authority, we would ask, is it not fair to conclude that the redress granted to her by the legislature is an exercise of judicial authority? The nature of the power employed must be judged of by having an eye to the like power exercised by a co-ordinate department. Should the executive try and sentence a felon to punishment, the judicial authority exercised could not be mistaken, and should the judiciary undertake to enact and promulgate a law, and exact obedience to it, the act would doubtlessly be pronounced, at once, an usurpation upon the functions of the legislature.

The enactment of the third section of the act of 1823 being, in our opinion, an exercise by the legislature of judicial power, our attention will now be engaged for a short time with the inquiry whether the exercise by the legislature of judicial power in the passage of a law is repugnant to the constitution. The decision of this point must depend upon the sound construction of the sixth section of the bill of rights, which says "that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other." This political maxim made its appearance in some form in all the state constitutions formed about the time of the war of the revolution, and is said to have been borrowed by them of the celebrated Montesquieu's *Spirit of Laws*, vol. 1, p. 181. In whatever terms they have adopted it, in none of these constitutions are the several departments kept wholly separate and unmixed. In some of them, as in the constitution of this state, the executive is appointed by the legislature, and the judiciary by the executive; and in others, the power of the several departments are still more blended and mingled together. Upon a full consideration of each of them, it seems to us to have been the in-

tention to engraft this invaluable maxim of political science on their respective systems only so far as comported with free government, and to prohibit the exercise by one department of the powers of another department, or to confine each department to the exclusive exercise of its own powers. This last is admirably expressed in the constitution of Massachusetts, and evinces a perfect acquaintance of its framers with the pages and doctrines of Baron Montesquieu. It is worded thus: "That the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." The inhibition goes to the practical exercise of powers conferred by the constitution, and to be used after it is in operation, and does not apply singly to the original distribution of powers among the departments of the government. In the same sense we construe the sixth article of our bill of rights, which has the same objects in view with the constitution of Massachusetts, although somewhat different terms are employed to express them. The one imitates the language, and the other dives into and expresses the meaning of the venerated author from which they both copied. Their common purpose is to confine, in practice, the action of each department to its own appropriate sphere, by forbidding to it the use of powers allotted to the co-ordinate departments.

We have already determined the first point, and we have now to add our perfect conviction that the exercise by the legislature of judicial power in the passage of a law is repugnant to the constitution. Our conclusion from all this reasoning is, that the third section of the act of 1823 is a nullity, and was rightly considered unavailable to support the plaintiff's action in the county court where the suit originated, and that judgment, therefore, ought to be affirmed.

In acting upon this case, we wish to be understood to decide nothing but the points before mentioned; only to adjudge that the exercise by the legislature of judicial power is in opposition to the constitution, and that the enactment of the third section of the act of 1823 was an exertion of judicial power, and is necessarily a void act:

Judgment affirmed.

**MAYOR AND CITY COUNCIL OF BALTIMORE v. HUGHES'
ADMINISTRATOR.**

[1 GILL & JOHNSON, 480.]

A POWER IN THE CITY COUNCIL TO TAX any particular part of the city for paving the streets, sinking wells, or erecting pumps, "which may appear for the benefit of such particular part," is not confined to any particular benefit, such as that which results from paved streets. The preservation of the health of such particular part of the city is a benefit within the meaning of the act conferring the power.

THE LEGALITY OF SUCH A TAX does not depend upon the fact whether the paving does or does not benefit the district, but upon the object of the corporation in having the paving done.

AN ORDINANCE PROVIDING FOR SUCH PAVING and imposition of the tax need not expressly state that it is for the benefit of the particular district.

BUT WHERE IT APPEARS FROM THE ORDINANCE that the tax imposed on a particular district is for the general benefit of the city, it is void.

IDEM.—In an ordinance declaring that if the health commissioner should report, in writing, "that a nuisance exists in any street, lane, or alley in the city of Baltimore, which will endanger the health thereof," the word "thereof" was construed to refer not to the whole city, but to a street, lane, or alley, and the ordinance was considered within the power conferred by the charter.

A MUNICIPAL CORPORATION MUST ACT within the limits of its delegated authority. But if its ordinances admit of two constructions, they should receive the one consistent with the power given, and not that which is in violation of it.

THE UNION OF TWO BOARDS OF COMMISSIONERS, without any direction regarding the mode of performance of their duties, will dispense with the formality of the written report which formerly one prepared before the other could act.

WHERE AN ORDINANCE REQUIRED THE COMMISSIONERS to form a decisive opinion that a nuisance exists which would endanger the health of a particular part of the city, it is sufficient if this opinion appear from the certificates in the warrant. If the warrants disclose an opinion that the nuisance might endanger the health of the city, the tax imposed can not be enforced.

IF THE EXISTENCE OF THE NUISANCE is required by the ordinance to be certified to in writing, the fact can not be established by parol.

ONE COMPELLED TO PAY THE DEBT OF ANOTHER may recover from that other. Otherwise, with respect to the voluntary payment of another's debt without authority.

A MUNICIPAL CORPORATION CAN NOT RECOVER A TAX in an action for money paid, laid out, and expended, although the corporation has paid the cost of the improvement for which the tax was imposed.

IDEM.—Nor can the cost of the improvement be recovered by the corporation in an action for work and labor done, etc., there being no legal liability to pay the tax therefor, the ordinance not being properly pursued.

APPEAL. Assumpsit to recover the sum alleged to be due for certain paving taxes, assessed upon the property of defendant's intestate. The action was originally brought in the Baltimore county court, but, on suggestion of the defendant, was removed to the Harford county court. The declaration contained six counts; three, for the amounts of taxes respectively assessed upon different pieces of property; the fourth, for the aggregate amount of the paving taxes generally; the fifth, for money paid, laid out, and expended; and the sixth, for work and labor done. Plea *non-assumpsit*, and issue joined. The case appears from the opinion. The court below instructed the jury as requested by the defendant, and refused the plaintiffs' instruction, who thereupon excepted. The verdict of the jury was returned for the plaintiffs, but for a small part of the amount they demanded; whence the appeal.

Taney, attorney-general, and J. Scott, for the appellants.

R. Johnson, contra.

By Court, BUCHANAN, C. J. A recovery by the plaintiffs of the taxes imposed under the thirteenth section of the ordinance of the ninth of March, 1807, is resisted by the defendant on two grounds: 1. That the power given by the ordinance has not been well executed; 2. That the ordinance itself is not authorized by the charter. The second ground relied upon involves the construction both of the charter and the ordinance, and will be first examined.

The second section of the act of 1797, c. 54, a supplement to the act incorporating the city of Baltimore, gives to the corporation power to pass all ordinances necessary for paving and keeping the streets, etc., in repair, "and to tax any particular part or district of the city for paving the streets, lanes, or alleys therein, or for sinking wells or erecting pumps which may appear for the benefit of such particular part or district." In the case of *The Mayor and City Council of Baltimore v. Moore and Johnson*, 6 Harr. & J. 380, it was decided by this court that the word "which," in that provision of the act, related as well to the paving the streets, lanes, and alleys as to the sinking of wells and erecting pumps, and that the corporation had authority to tax any particular part or district of the city for paving the streets, lanes, or alleys therein which might appear for the benefit of such particular part or district. The reasoning by which that conclusion was arrived at need not be repeated in this place. A different construction, however, would certainly be at war with the

intention of the legislature, as it never could have been contemplated to give to the corporation the power to tax any particular part or district of the city for any paving which was for the general benefit, and not for the benefit of the immediate part or district taxed, which, under a different construction, would be the effect of the second section of the act of 1797, taken altogether. Under this restricted construction, limiting the power of the corporation to tax any particular part or district of the city for paving the streets, lanes, and alleys therein, to a paving which shall be, or appear to be, for the benefit of such particular district, and not for the general benefit of the city, which ought to be paid for out of the general fund, and not by the imposition of a special tax upon any particular part of the city, we think the corporation is not confined to any particular description of benefit, such as the ordinary benefit and advantage of paved streets, and that the preservation of the health of such particular part of the city is a benefit within the meaning and scope of the act.

The legality of levying the tax does not depend upon whether the paving does or does not in fact benefit the particular district that is taxed, but upon the object, the motive of the corporation in causing the paving to be done. And in an ordinance providing for such paving, and the imposition of such a special tax, it is not necessary that it should be expressly stated to be for the benefit of the particular district; but if nothing appears to the contrary, such an exercise of the special taxing power will be taken to have been in pursuance of the authority given by the charter. It will be presumed that the corporation did not exceed its powers, but imposed the tax for the purpose only for which the charter authorizes it to be imposed, and that the paving appeared to the city council to be for the benefit of the particular district.

But where an ordinance provides for the paving a street, etc., in a particular district, and the imposition of a special tax for that purpose on such district, which paving appears by the ordinance to be for the general benefit of the city, and not for the benefit of the particular district, such an ordinance is not in pursuance of the authority conferred by the charter, and is void. And such, it is contended, is the character of the thirteenth section of the ordinance of the ninth of March, 1807, providing for the imposition of the taxes the recovery of which in this suit is resisted. The provision of that section is in these words: "That if the commissioners of health shall at any time report in writing

to the city commissioners that a nuisance exists in any street, lane, or alley in the city of Baltimore, which will endanger the health thereof, and the city commissioners, upon a full examination thereof, should be of the same opinion, and that the same can not be effectually removed without paving such street, lane, or alley, they are hereby authorized and required to proceed to the paving of such street, lane, or alley, and to issue their warrant under their hands to the city collector, directing him to collect the tax which may be imposed for paving the same," etc. It is supposed that it appears upon the face of this ordinance that the nuisance here authorized to be removed by paving the street, etc., in which it may be found to exist, is such a nuisance only as in the opinion of the commissioners of health and the city commissioners, will endanger the health of the city generally, and not of the particular district in which the paving is authorized to be done, and the tax to be imposed; and that the paving and taxing is intended for the general benefit of the city, and not of the particular district. If such be the true construction of the ordinance, it can not be questioned that it was unauthorized by the charter, and that provision of it nugatory and void.

But to arrive at that conclusion, it must either be assumed that a nuisance can not exist in any particular part or district of the city of Baltimore, affecting or endangering the health of such particular part or district, without also so affecting or endangering the health of the whole city, or of the city generally, as to be a matter of such general concern, as that the means resorted to for removing it can only be paid for out of the general fund, and not by a tax upon the particular district in which it may exist; and consequently that the paving contemplated and provided for by this ordinance, could only have appeared to be, and been intended for the general benefit of the city, and could not have been considered to be and intended for the benefit of the particular district to be paved, or that the language of the ordinance is such as to show the object of the paving provided for to be the general benefit of the city, and not the benefit of the immediate district.

With respect to the first of these positions, it by no means appears to us that a nuisance can not exist in a particular part or district of the city of Baltimore, affecting or endangering the health of such part or district, without also affecting or endangering the health of the city generally, and that no paving can be authorized for the removal of a nuisance endangering the health of a particular district, without having for its object

the general benefit of the city, and not the benefit of the district in which the nuisance may exist. And if such a nuisance may exist, of which the corporation is competent to judge, it has authority, under the charter, to pass an ordinance for the removal of such a nuisance by paving, and to impose a local tax for that purpose, if it shall appear to be for the benefit of the particular district in which the paving is authorized to be done. And if there be nothing expressed in this ordinance to the contrary, the presumption is that the nuisance contemplated is one endangering the health of the immediate district in which it exists, and that the sole object of the paving provided for is the benefit of that particular district. Is there, then, anything in the language of the ordinance to sustain the second position? Is there any expression pointing to the preservation of the general health of the city, or to the general, and not a local benefit, as the motive for authorizing the paving provided for? This case has been argued as if the language of the ordinance was, "which will endanger the health of the city." But whatever might be the effect of such words, if used, that is not the language of the ordinance; the commissioners in their warrants say that they conceive the streets directed to be paved "to be in a state of nuisance, which might endanger the health of the city." And it is probable that the language of the warrants and of the ordinance may have been confounded by the counsel. The words of the ordinance are: "That if the commissioners of health shall at any time report in writing to the city commissioners that a nuisance exists in any street, lane, or alley in the city of Baltimore, which will endanger the health thereof," etc. Not in terms the health of the city, but "thereof;" and the question is, whether the word "thereof" must be held to relate to the city of Baltimore, or may refer to the street, lane, or alley in which a nuisance may be found to exist.

The power given by the charter, under which this ordinance was passed, is "to tax any particular part or district of the city, for paving the streets, lanes, or alleys therein, or for sinking wells or erecting pumps which may appear for the benefit of such particular part or district." Now, it has never been pretended that the word therein in that clause related to the city, and meant for paving the streets, lanes, or alleys in the city. But it has always been considered (and properly) that it related to the part or district of the city to be taxed, and meant for paving the streets, lanes, or alleys in such particular part or

district. And the only question raised on that clause of the charter in the *Mayor, etc., v. Moore and Johnson*, was, whether the latter part of it, "which may appear for the benefit of such particular part or district," related to the sinking of wells and erecting pumps, or extended also to the paving the streets, etc. So here we think that the word "thereof" in the ordinance does not relate to the city of Baltimore, so as to make it mean a nuisance which will endanger the health of the city of Baltimore, but that it relates to any street, lane, or alley, etc., and means a nuisance that will endanger the health of such street, etc., the words, "in the city of Baltimore," being only used as descriptive of where the street, etc., lies; and that there is nothing appearing upon the face of the ordinance to show that the general benefit of the city is the object of the paving provided for, and not the benefit of the particular district to be taxed. This construction brings the ordinance clearly within the power conferred by the charter, and although it is true that a corporation must act within the limits of its delegated authority, and can not go beyond it, yet it ought not, by construction, to be made to mean what is not clearly expressed; but when an ordinance will admit of two constructions, it should receive that which is consistent with the power given, and not that which is in violation of it.

The other ground relied on by the defendant is that, conceding the ordinance to be justified by the charter, yet the power given by it has not been well executed, and two objections are raised: 1. That by the ordinance a report in writing is required of the existence of a nuisance, etc., by the commissioners of health to the commissioners of the city, which does not appear to have been made; 2. That the ordinance requires the nuisance to be of such character as will, in the opinion of the commissioners, endanger the health, etc., and that the commissioners have not so stated.

There is nothing in the first of these objections. The ordinance of the twenty-second of March, 1807, uniting the powers and duties of the city commissioners and commissioners of health, provides for the appointment of four persons to be city commissioners and commissioners of health, with all the powers and duties united in them of the commissioners of health and city commissioners, and surely the formality of a written report by them to themselves was necessarily dispensed with. Besides, there would be an inconsistency between the two ordinances, the one uniting the two bodies into one, and the other

requiring the one to make a report to the other, when no such separate bodies existed, and the ordinance of the twenty-second of March, 1807, expressly repeals all such parts of the ordinance of the ninth of March, 1807, as are inconsistent with anything contained in it. An entry in the books of the commissioners of their decision is not required, and the certificates in their warrants of the existence of the nuisances and of their characters, would have been sufficient, if in other respects the ordinance was complied with. But the ordinance has not been complied with; the warrants of the commissioners should, to gratify the ordinance, have contained statements of the existence of nuisances in the respective streets specified, which would in their opinions endanger the health thereof, and not that they might do so. A positive and decided opinion is required, and not the expression of a doubt as to the dangerous character of the nuisance to be removed. And it is evident, from the terms used by the commissioners, that they had formed no decided opinion on the subject. They say in each warrant, that they conceive the street mentioned to be in a state of nuisance which might endanger the health of the city, apart from the danger they speak of to the health of the city, instead of the health of the particular street, which is of itself a departure from the provision of the ordinance; the opinion they express is not such as the ordinance requires. The nuisance authorized to be removed, is required to be such as in the opinion of the commissioners will be dangerous, and not such as may by possibility be dangerous; and the second objection is, we think, well taken.

The second exception was properly abandoned at the argument. The ordinance requiring the evidence of the existence of a nuisance, and of its dangerous character and tendency, to be in writing, the plaintiff was not competent to prove it by oral testimony at the bar.

The action for money paid, laid out, and expended, must be founded upon a contract, express or implied, and it is a settled rule, that no person can by a voluntary payment of the debt of another, without his authority, make himself a creditor of the person whose debt is thus paid; but if one is compelled, or is in a situation to be compelled, to pay the debt of another, as in the case of a surety, and does pay it, the law implies a promise on the part of him for whom the money is paid, on which an action may be sustained; for in such case, it is not a voluntary, but a compulsory payment.

In this case, there was no debt due by the defendants' intestate, and the payment made by the plaintiffs was on account of a contract entered into between the commissioners and the man who did the paving. But if there had been a debt due by the defendants' intestate to the workman who did the paving, which the plaintiffs were not compelled to pay, a voluntary payment by the plaintiffs, without the authority or request of the defendants' intestate, could not raise an assumpsit against him; and there is no evidence of any such authority or request. Or if the defendants' intestate was indebted to the plaintiffs on account of the taxes imposed, that liability would not sustain a count for money paid, laid out, and expended, which is the fifth count in the declaration in this case. And we can perceive no ground on which the construction prayed for to the jury, that the plaintiffs were entitled to recover on the sixth count for work and labor done, etc., could have been properly given. The defendants' intestate was under no legal obligation, imposed by the ordinance, to pay for the paving done; and the work was not done at his instance, but by the plaintiffs, under and in pursuance of one of their own ordinances, and in the supposed exercise of their corporate powers.

We concur, therefore, in opinion with the court below on all the bills of exceptions.

Judgment affirmed.

ORDINANCES OF MUNICIPAL CORPORATION.—See note to *Miles v. Davidson*, 16 Am. Dec. 189.

ALDRIDGE v. WEEMS.

[3 GILL & JOHNSON, 26.]

AN ASSIGNMENT OF A MORTGAGE may be good without actual delivery, where it is connected with evidence to show that the mortgagee intended to transfer his interest. Principle applied to the assignment of a mortgage found among the papers of the mortgagee after his death.

A COURT OF EQUITY HAS THE POWER, and will make every possible effort within the range allowed by the statute of frauds, to heal the infirmities of defective contracts of every description that can be sanctioned by the law.

APPEAL from a decree of the court of chancery dismissing complainants' bill. The bill was filed against Weems, a mortgagor of one Tongue, and against Hall, Tongue's administrator, for the purpose of enforcing an assignment of the mortgage from Weems to Tongue, the latter being indebted to the com-

plainants, and having assigned, as was alleged, said mortgage to them. The facts appear from the opinion. The contention was occasioned by the circumstance that the mortgage with the assignment indorsed thereon was found among the papers of Tongue after his death.

Magruder, for the appellants. Delivery was not essential to the assignment. There being a consideration paid for the assignment, equity will enforce it: *Black v. Cord*, 2 Harr. & Gill. 100; *Lord Carteret v. Paschal*, 3 P. Wms. 199; *Bunn v. Winthrop*, 1 Johns. Ch. 336. Tongue held the assignment in trust for the benefit of the complainants: *Moses v. Murgatroyd*, 1 Johns. Ch. 119 [7 Am. Dec. 478]; *Cumberland v. Codrington*, 3 Id. 261 [8 Am. Dec. 492]; *Shepherd v. McEvers*, 4 Id. 136 [8 Am. Dec. 561]. This is not an instrument within the statute of frauds, and could be the foundation for a suit in equity: *Claverling v. Claverling*, 2 Verm. 473; *Boughton v. Boughton*, 1 Atk. 625; *Johnson v. Smith*, 1 Ves. 314; *Souverybye v. Arden*, 1 Johns. Ch. 240, 256; 1 Madd. Ch. 299; Pow. on Mort. 460; Ham. Dig. 365, pl. 21; *Ex parte Bruce*, 1 Rose, 374; *Hankey v. Vernon*, 2 Cox Ch. 18; *Burn v. Burn*, 3 Ves. 573, 582, 583; *Mestaer v. Gillespie*, 11 Ves. 624.

S. Pinkney and Shaw, for the appellee. The delivery of an instrument in writing is essential: *Clarke v. Ray*, 1 Harr. & J. 323. And here there was no delivery, actual or constructive: 2 Jacob's L. D. 223.

By Court, MARTIN, J. The bill charges that Tongue and McPherson were indebted to Aldridge and Higdon in a large sum of money; and that Tongue, who was the active partner, had repeatedly promised to secure the payment of the same. That Weems was indebted to Tongue, and gave him a deed of mortgage on the fourteenth day of December, 1821, to secure the payment of the debt in four years after the date of the mortgage. That before the expiration of the time allowed Weems for payment, Tongue proposed, and the complainants agreed to accept, an assignment of this mortgage as security to them in part payment of their debt, and accordingly the following assignment was made by Tongue on the mortgage: "For value received, I hereby transfer, assign, and make over to Messrs. Aldridge and Higdon, of Baltimore, this mortgage, and the debt so intended to be secured thereby. Witness my hand and seal this eleventh day of January, eighteen hundred and twenty-five." That Tongue, in a short time after this assignment, died intestate,

and letters of administration were granted to Hall, etc. The answer of Hall admits the partnership of Tongue and McPherson; that the mortgage as set out in the bill was executed by Weems, and that the indorsement on the mortgage purporting to be an assignment, is in the handwriting of Tongue; that the mortgage was found among Tongue's papers at his death. He further admits that Tongue might have promised to secure the debt due to the complainants, and that the indorsement may have been written on said mortgage with a view of complying with such promise; but he denies that there ever was a delivery in fact of the said mortgage by Tongue, or an acceptance thereof by the said complainants. It is also stated in the answer that Tongue died in January, 1826. The only question put in issue by this bill and answer is, whether it was necessary to give legal effect to this assignment that there should be a delivery of the mortgage by Tongue to the complainants.

In examining this case, it is necessary to keep constantly in view that this is not a mortgage or deed that requires delivery to give it legal effect, but an assignment of Tongue's interest in the mortgage that may be good and operative without actual delivery, if there is evidence to show the party intended it to transfer his interest in the thing assigned. This doctrine is admitted by the chancellor in his decree, and that a court of equity has the power, and will make every possible effort within the range allowed by the statute of frauds, to heal the infirmities of defective contracts of every description that can be sanctioned by the law. This assignment has all the forms and solemnities necessary to constitute a good contract. It is in the handwriting of Tongue, and signed by him, and is a full expression of his intention to transfer his interest in the mortgage to Aldridge and Higdon. This not only appears on the face of the assignment itself, but is admitted by the answer of Hall, the administrator of Tongue. In his answer, responsive to the bill, he admits the assignment is in the handwriting of Tongue, and was found among his papers at his death. That the said Tongue might have promised to secure the debt due to Aldridge and Higdon, and that the indorsement may have been written on the said mortgage by the said Tongue, with a view of complying with such promise. It was the moral duty of Tongue to secure the debt due to Aldridge and Higdon. It was his express agreement to do so. He has made a solemn instrument in his own handwriting, and signed by him, to produce that effect, and this instrument remains in his possession uncanceled

until the day of his death; yet it is said you are to presume this was all idle and nugatory, and that, too, in a court of equity, whose peculiar province and pleasure it is to heal defective contracts, and carry the intentions of parties into effect. This doctrine would pervert the equitable powers of a court of chancery.

The object and intention of Tongue when he made the assignment is not only obvious from the writing itself, but is admitted by the administrator, and his permitting it to remain uncanceled, affords a strong presumption that the same intention continued to the day of his death. This record presents no sufficient evidence to rebut that presumption. We are therefore of opinion that the decree of the chancellor is erroneous and ought to be reversed.

Decree reversed.

DELIVERY OF DEEDS.—See the discussion of the subject in the notes to *Jones v. Jones*, 16 Am. Dec. 39.

WINCHESTER v. UNION BANK OF MARYLAND.

[2 GILL & JOHNSON, 73.]

THE GENERAL ISSUE PLEADED DOES NOT ADMIT the character in which one sues who claims to be the trustee of an insolvent debtor.

IDEM.—On the general issue, the plaintiff must prove everything essential to the showing himself clothed with the character and authority of a trustee.

THE DIFFERENT INSOLVENT LAWS OF THE STATE constitute one general system, and must be construed together. Under such construction the trustee must give a bond with sureties before he can act.

APPEAL. Assumpsit. The opinion states the case. Verdict and judgment for the defendant.

E. Johnson and Raymond, for the appellant. The certificate of the commissioners in insolvency, that the insolvent had complied with the requisitions of the statute, and the final discharge of the insolvent, are conclusive of the regularity of the proceedings in the insolvent debtors' court, and can not be collaterally reviewed in a suit between the trustee and a debtor of the insolvent. Under the act of 1816, establishing the insolvent debtors' court, a permanent trustee is not required to give bond with security. The defect, if it be one, of the trustee's not having given bond, can only be taken advantage of by plea in abatement. Counsel referred to Stark. Ev. 547, 548;

Cox's Dig. tit. Ex'r, 14; *Childress v. Emory*, 8 Wheat. 642; *De Wolf v. Raband*, 2 Pet. 498; 3 Bac. Abr. 53; *Kennedy v. Boggs*, 5 Harr. & J. 403.

Taney, attorney-general, and Kennedy, contra, cited: *Childress v. Emory*, 8 Wheat. 671; 2 Stark. Ev. 168 (note); the act of 1798, c. 101, sub. c. 3, sec. 8; 2 Stark. Ev. 192; *Snelgrove v. Hunt*, 3 Serg. & Low. 414; 2 Phil. Ev. 259, 289; *Evans v. Mann*, Cowp. 569; *Hunter v. Potts*, 4 T. R. 182; 3 Bac. Abr. 53; *Harper v. Hampton*, 1 Harr. & J. 622; *Johnson v. Collings*, 1 East, 98; 3 Bos. & P. 559; 3 East, 177; 1 Camp. 175; 2 Stark. Ev. 173; 1 Stark. 481.

By Court, BUCHANAN, C. J. This is an action of assumpsit brought by the appellant, in Baltimore county court, as trustee of James Williams, an insolvent debtor. The declaration contains the usual counts, for goods sold and delivered, money lent, etc., to which there is the general issue plea of non-assumpsit.

The appellant claims in the character of trustee, and at the trial, for the purpose of proving his title and right to recover, produced in evidence the papers and proceedings connected with the application and final discharge of Williams, the insolvent. By which it appears that the bond given by the appellant for the performance of his duty as trustee, is without security, for which reason the court below instructed the jury that he was not entitled to recover. And it is here contended: 1. That the certificate of the commissioners of insolvent debtors for the city and county of Baltimore, that Williams, the insolvent, had complied with all the requisitions of the insolvent laws, and his final discharge, are conclusive evidence of the regularity of the proceedings, and of the insolvency of Williams, and of the appellant's right to sue in an action between him, as trustee, and a debtor of the insolvent; 2. That under the insolvent laws of the state, a trustee of an insolvent debtor discharged in the city of Baltimore is not required to give bond, with security, for the faithful discharge of his duty. And, 3. That if a bond, with security, is required to be given by a trustee of an insolvent debtor, he, not having given such a bond, can only be taken advantage of by a debtor of the insolvent, in a suit by the trustee, by a plea in abatement, and not on a plea of non-assumpsit.

The whole of these points were raised in argument, and elaborately discussed in the case of *Houck v. Crouse*, decided by

this court at June term, 1828, in which it was held that in a suit by a trustee of an insolvent debtor, claiming in his character of trustee, and not in his own right, a general issue plea does not admit the character in which the plaintiff sues, but that such a suit is analogous to the case of an assignee of a bankrupt claiming in that character; and that on the general issue the plaintiff must prove everything essential to the showing himself clothed with the character and authority of a trustee, which could not be done by the production of the certificate of the commissioners and the final discharge of the insolvent only, but that all the proceedings must be exhibited. That the different insolvent laws of the state constitute one general system, and must be construed together, and, so construed, require a bond, with security, to be given by the trustee before he can act as such, without which he can not be invested with the character and rights of a trustee. That to establish his character as trustee, and right to sue in that capacity, it is incumbent on the plaintiff to show that such a bond was given by proof of the bond itself, and not by the production merely of the certificate of the commissioners, that the insolvent had complied with all the requisitions of the insolvent laws and his final discharge; and that if he does not do so, the defendant is not driven to a plea in abatement, but may take advantage of it on the general issue. And we have heard nothing in the argument of this case to induce a departure from what was decided in the case of *Houck v. Crouse*. We concur, therefore, with the court below in the instruction given to the jury.

Judgment affirmed.

WINCHESTER v. UNION BANK OF MARYLAND.

[2 GILL & JOHNSON, 79.]

THE TRUSTEE OF AN INSOLVENT DEBTOR DERIVES HIS RIGHT from his appointment, and, as the law requires he should give bonds before acting as such, until such bond is given he can not sue for, nor in any other manner intermeddle with the property of the insolvent.

NOTE.—A bond given after suit is commenced does not relate back so as to entitle the trustee to recover.

APPEAL. Assumpsit. The opinion states the case. Verdict and judgment for the defendants.

E. Johnson and Raymond, for the appellants, cited, on the additional point made in this proceeding, Act of 1805, c. 110, sec.

4; 1808, c. 71, sec. 3; 3 Bac. Abr. tit. Ex'r, 52; 5 Jacob's L. D. tit. Relation.

Taney, attorney-general, and Kennedy, contra, cited, in addition to the authorities referred to by the opposing counsel, 2 Stark. Ev. 109; 3 Bac. Abr. 53.

By Court, BUCHANAN, C. J. This case is, in all respects, the same as that of *Winchester, trustee of Williams, v. The Union Bank*, just decided, with this difference only, that here a bond, with security, appears to have been given by the trustee, but subsequent to the bringing of the suit, though before the trial. And it is contended, in addition to the several points raised and decided in that case, that the bond thus given has such relation back, as to entitle the plaintiff to recover. But this is not like the case of an executor, who derives all his interest from the will; and though probate is necessary to the authentication of his right, yet it is the will alone which gives it, and the probate is only the legitimate evidence of his title. He may, therefore, sue, but can not declare before probate, for he can not assert his right in court as an executor without producing his letters testamentary. It may, more properly, be assimilated to the case of an assignee of a bankrupt, who derives his title from the assignment, which divests the bankrupt of his personal property and vests it in the assignee from the time of the bankruptcy; or, in this particular, to the case of an administrator, who derives his title from his letters of administration, and can not sue or do any other act before letters of administration granted, though, when administration is granted, it vests the property in the administrator by relating from the time of the death of the intestate.

So a trustee of an insolvent debtor derives his right from his appointment and the insolvent laws requiring that he shall give bond, with security, for the faithful performance of his duty, before he acts as such. Until such a bond is given he is not invested with the functions of trustee, and can neither sue for, nor in any other manner intermeddle with the property of the insolvent. He is not, in contemplation of law, a trustee; his character as such is not completed until the bond required is given. The mere appointment, unaccompanied by his giving a bond, with security, confers upon him no power over the goods of the insolvent; but it is the bond, as constituting an ingredient in the appointment, and is the perfection of it, that

gives him authority to act and assert his rights in the character of trustee.

The bond, therefore, in this case having been given after the suit was brought, the suit was instituted when the plaintiff was not clothed with any power to sue, or in any manner to interfere with the property of the insolvent in the capacity of trustee, and can not be maintained.

Judgment affirmed. .

AM. DEC. VOL. XIX—17

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

JENNISON v. HAPGOOD.

[7 PICKERING, L.]

THE SUPREME COURT, AS A COURT OF CHANCERY, has no jurisdiction to resettle an executor's account. An injured party's remedy is by appeal; or if the proceedings in the probate court are void for fraud, the executor should be cited to account in the probate court.

THE REMEDY AGAINST AN EXECUTOR who sells the right of redemption in lands devised subject to a mortgage, instead of redeeming, as directed by the testator, is not by a bill in equity, at the suit of the devisee, but at law for damages.

IDEM.—But if the executor sells to himself through the medium of an agent, the bill will lie.

A TRUSTEE'S PURCHASE AT A SALE OF THE TRUST PROPERTY is not void; it will bind the *cestui que trust* if he acquiesce; if he dissent in a reasonable time, the trustee will be considered as holding for him.

BILL in equity. The opinion states the case.

Mills and Lincoln, for the defendant.

L. Bigelow, *contra*.

By Court, PARKER, C. J. The general question which has been argued is, if this court, in virtue of the statute of 1817, c. 87, has jurisdiction of the matters charged in the plaintiffs' bill. The plaintiffs are the administrators of John Grout, deceased; the defendant is the executor of Jonathan Grout, deceased. The plaintiffs allege in effect, that Jonathan Grout devised his homestead farm, which was under mortgage, to John Grout, upon certain conditions, viz.: that the defendant, as executor, should, after paying the other debts, pay one half of the mortgage for the benefit of John Grout, and then one thousand dollars to each of the testator's five daughters, and

then the other half of the mortgage, to the intent that John Grout should have a fee-simple in the homestead farm; that the defendant had sufficient assets, but did not appropriate them according to the trust, but in violation of his duty sold the homestead to pay debts, which he ought to have paid by other estate of the testator; and that he purchased the homestead, in the name of an agent, for himself, at a price much less than the value. The plaintiffs then pray that the defendant may be compelled to render an inventory and an account, and reconvey to the administrators of John Grout, for the use of his widow, heirs, and creditors.

As to all the accounts and proceedings in the probate court, where upon the face of them that court has jurisdiction, this court, as a court of chancery, has no jurisdiction, but will hold all that has been properly done there as conclusive. If any one was injured by any order or decree of that court, the remedy was by appeal to the supreme court of probate. If, as the plaintiffs allege in the amended bill, the proceedings were void for fraud, and if the plaintiffs may treat them as a nullity, that would not give this court, as a court of chancery, original jurisdiction. If the proceedings are merely void, the defendant must be cited to account in the probate court. If errors have happened, they are to be corrected in that forum, if corrected at all. We can not, in this incidental way, resettle an account here, which has been once settled there, any more than we could revise the question, whether there was a will, or whether it had been duly proved. The court will proceed upon these principles in ascertaining the facts, if the cause shall come to a hearing upon the merits, to wit, what assets came to the defendant's hands, what debts he has paid, and so of every matter properly done or cognizable in the probate court, it is to be considered true and conclusive.

In regard to the homestead farm, if the plaintiffs should prove that the defendant had assets sufficient to have redeemed the whole, after paying the debts and legacies, but violated his duty by selling it to a stranger, who was innocent, such evidence would not give this court jurisdiction, because there would be a complete remedy at law for pecuniary damages, and such only, in the case now supposed, could be recovered. The title would pass to the innocent vendee, and the plaintiffs would be entitled to recover damages for this, as for any other maladministration of the estate. But if the plaintiffs should prove that the sale was made to an agent for the defendant's account,

and that the defendant in that way bought the estate in violation of his trust, when he had funds, after payment of the debts and legacies, to have redeemed, before the equity was foreclosed, we are of opinion that those facts would bring the plaintiffs' case within the statute. There would be an implied trust, arising under a will in the settlement of an estate, and there would not be so complete a remedy at law. A recovery of damages would not, perhaps, be so good a satisfaction as a recovery of the estate. The defendant still holds the estate, and may be compelled to convey it to the plaintiffs. Upon this point of the case it is to be observed that the law will not permit one to buy an estate which he was intrusted to sell in such manner as to make any profit or benefit to himself. It is not strictly true that the trustee may not purchase; in other words, the purchase is not merely void. If the *cestui que trust* should acquiesce in the sale, he would be bound; but if he dissents in a reasonable time, the trustee will be considered as holding for the benefit of the *cestui que trust*. A court of chancery would have power to do justice in such a case, either by compelling a reconveyance, or the payment of the excess, as ascertained by a second sale.

If the bill should be sustained upon this ground, the proceedings in the probate court, which upon the face of them appear rightly done, will be taken to be true, as has been before stated. And the objection of a long acquiescence will be entitled to much consideration, and perhaps will be a sufficient answer. Upon this point the court would observe that there is no precise rule as to what length of time, or what other fact or circumstance shall be considered sufficient proof of acquiescence. Lord Thurlow, 2 Bro. C. C. 426, seemed to think three years a long acquiescence. "When," he inquires, "would such a transaction as this end, if not in three years?" In that case, *Fox v. McCreth*,¹ the defendant was held to account for the difference between the purchase and resale, but it was a case strongly marked with gross fraud. In *Whichoole v. Lawrence*, 3 Ves. 752, the court thought that an acquiescence for six years by a large number of creditors ought not to bar. But in the case now under consideration, the plaintiffs did not bring their suit until nine years after the defendant enforced his purchase by a recovery against one of the plaintiffs, without any objection on her part; and the purchase was made eleven years before the plaintiffs' bill was brought. We are strongly inclined

1. *Fox v. Maccreth*.

to think that such an acquiescence, under such circumstances, would be a sufficient answer.

And it is to be remarked that no such bill in equity could then have been maintained. We are acting upon a statute which has been passed many years after the transaction complained of, and considering the great caution and solicitude manifested by the legislature upon this subject, it seems to us that it would be carrying the remedy in equity to a great extent if we were to open the transaction as to this point, viz., that the defendant himself became the purchaser, after so long an acquiescence. This, however, will be a matter for further consideration, if the cause shall proceed upon a hearing of the merits.

There is another part of the amended bill, as to which it seems we have jurisdiction; that is, as to the other parcels of land sold. The proceeds of the sale were carried into the account, and allowed by the judge of probate. But the plaintiffs now allege that the defendant ought to account for a large sum, because the defendant bought in the estates and has made a profit of them. The objection to this point, viz., that the defendant is to be considered as trustee, buying for his own use, and so accountable for the excess of value, has already been noticed, and would apply to this part of the case as well as to the homestead farm. But as to the other point, viz., that the defendant had, in fact, assets to have paid off the incumbrances when he bought in the mortgage, or perhaps at any time before the foreclosure, the lapse of time ought not to prevent the proof; for if he had such assets, it seems that the conveyance to him was *ipso facto* in trust for the plaintiffs, and he could not acquire a title against them without their consent in such way. So there ought perhaps to be no bar to the proof of such fact short of twenty years, the statute bar for entries, etc., on real estate.

And further, if the bill should be heard, it will be a question whether the plaintiffs, who represent John Grout, should not have offered to pay the one half of the mortgage which he was to pay according to the will, in case of a deficiency of assets to pay more than the debts and legacies, and one half of the mortgage. In such a case, the defendant would not have been obliged to pay the whole, and he could not redeem by paying half. If the defendant should now be compelled to convey to the plaintiffs, it can only be on their paying him one half, and the defendant's taking the other half out of the estate, unless there are sufficient assets first to pay one half of

the mortgage, then one thousand dollars to each of the five daughters, and then enough remaining to pay the other half of the mortgage.

NOTE.—At September term, 1828, the plaintiffs became nonsuited.

WAIT, APPELLANT.

[7 PICKERING, 100.]

A RESERVATION IN A LEASE of a brick-kiln and yard, giving to the lessor the option to take bricks from time to time at a fair market price, in lieu of the rent, does not vest property in the bricks in the lessor until he makes his election.

JDEM.—If the lessee dies and his administrator enters in his inventory the number of bricks on hand as a part of the estate which proves insolvent, he will be liable for the value of the bricks which he permits the lessor thereafter to take in lieu of rent.

APPEAL from the decree of the judge of probate disallowing an item in the appellant's account as administrator of William Buckley. The item was the following charge against the estate: "Thirty-nine thousand five hundred and seventy bricks, appraised, belonging to Judge Ward, two hundred and seventeen dollars and sixty-three cents." These bricks were included in the inventory of the estate with which the appellant was charged. It appeared that Artemas Ward leased to Buckley, the deceased, a certain brick-yard, at a certain rental, payable annually, in proportion to the amount of bricks manufactured; it being stipulated that not less than a specified number of bricks should be made annually. The lease provided that in lieu of the rental, "Ward may, at his option, from time to time, as bricks shall be manufactured by said Buckley, take to himself and appropriate to his own use, at the fair market price at the kiln, such quantity of bricks as shall be fully equivalent to the" rental. After Buckley's death, portion of the rent remaining unpaid, Ward entered, and was permitted to take the bricks in question. The estate was insolvent.

S. D. Ward, for the appellant. If the lessee die before the expiration of the term, and his administrator remain in possession, the lessor may distrain for the rent: *Braithwaite v. Cooksey*, 1 H. Bl. 465. The lessor's power, in this instance, was coupled with an interest which did not cease with the lessee's death: *Hunt v. Rousmanier*, 8 Wheat. 203.

Buttrick, contra. Under our insolvent laws, Ward would have no right to appropriate part of the estate to pay his debt: *McDonald v. Webster*, 2 Mass. 498; *Hunt v. Whitney*, 4 Id. 620; *Coleman v. Hall*, 12 Id. 570; *Wildridge v. Patterson*, 15 Id. 148; *Walker v. Hill*, 17 Id. 380; *Cox v. Morgan*, 2 Bos. & P. 398; *Vernon v. Hall*, 2 T. R. 648; *Lingham v. Biggs*, 1 Bos. & P. 82; *Cooper v. Chitty*, 1 Burr. 20. In regard to the power's ceasing with Buckley's death, counsel referred to *Anonymous*, 3 Salk. 223; *Ellis v. Paige*, 1 Pick. 43; *Rising v. Stannard*, 17 Mass. 282.

By Court, PARKER, C. J. The judge of probate charged the administrator with the value of a certain quantity of bricks which were in the possession of the testator at the time of his death, and which belonged to his estate, and were properly chargeable to the administrator, unless by virtue of the contract subsisting between him and Judge Ward, the latter had such a property or lien upon the bricks as authorized him to take possession of them and dispose of them to his own use. And we cannot perceive that he had such an interest by virtue of that contract. By the terms of the lease, the intestate acquired a full right to the yard for the time. He had a right to use the clay for the purpose of making bricks, and was required to make a certain quantity every year. He stipulated to pay a rent which was regulated by the quantity of bricks made, and this rent was payable in cash, so that the property in the bricks was unquestionably in the intestate; they were liable to attachment as his in his lifetime, and at his death, those remaining unsold were assets in the hands of his administrator. The right reserved to the lessor of taking bricks instead of money, gave him no present property, nor even a lien until he had signified his election by actually taking the bricks, and that right of election ceased with the life of the lessee, for at the very instant of his death, the property was fixed, so that no subsequent act of the lessor could change its character.

It is not the case of a power coupled with an interest, which, it is said, is not terminated with the life of him who grants it; for in such cases, the interest in the thing about which the power is to be exercised, must be a present interest. In this case there was no interest in the bricks until the lessor should have taken possession of them by virtue of the reservation in his contract. The lessee might have sold the whole kiln without violating his contract, and the purchaser could not have been defeated by this claim; and on the appointment of the admin-

istrator, he came into the full right of the intestate, and was immediately accountable and obliged to make an inventory thereof. The case cited by the counsel for the appellant from 1 H. Bl. 465, is upon the right of a lessor to distrain for rent which accrued after the decease of the lessee. This has very little analogy to the case before us; for in the first place, we think there is no right of distress in this commonwealth for rent, and besides, the right of the lessor in the case cited seemed to depend upon certain statutes which have no force here.

The principles adopted in the case of *Butterfield v. Baker*, 5 Pick. 522, seem quite applicable to this case. We think the decree of the judge of probate was right, and therefore it must be affirmed with costs.

MILLER v. MILLER.

[7 PICKERING, 133.]

A TENANT IN COMMON WHO SELLS GROWING TIMBER, and receives payment therefor, is liable to his co-tenant for money had and received, the title not being involved.

STATUTE OF LIMITATION IN SUCH CASE runs from the time of the payment and not from the time of the sale. If a promissory note is given, on which payments are made, the statute runs from the payments.

ASSUMPSIT for money had and received. Pleas, the general issue and the statute of limitation. The plaintiff's testator and the defendant were tenants in common of a certain lot, on which there was considerable growing timber. The defendant sold portions of this timber at different times, receiving at different periods payments in money for some of the wood. A promissory note was also taken by the defendant, on which payments were made. And for some of the wood real estate was received in payment. Credits were also given the defendant on the books of one of the purchasers of the timber, as part of the price of the wood. There was no evidence of any demand by the testator for an accounting; nor did it appear that the defendant had sold the real estate received in payment. The jury were instructed to find a verdict for the plaintiff for one half of the amount which the defendant had received in payment for wood sold from the lot owned in common, within six years before the commencement of this action, whether the payment was made in money, or real estate, or otherwise; and to include all the payments made on the note within that period, and the

credits given to the defendant, provided the jury were satisfied he had availed himself of them.

Verdict for the plaintiff; the defendant excepted.

Eddy, for the defendant. The action will not lie, the title to the land being involved: *Lindon v. Hooper*, Cowp. 414; 2 Stark. Ev. 110, 111; *Allen v. Thayer*, 17 Mass. 299; *Codman v. Jenkins*, 14 Id. 96. In any event, a demand should have been made before action was brought: *Taylor v. Bates*, 5 Cowen, 379; *Clark v. Moody*, 17 Mass. 145; *Ferris v. Paris*, 10 Johns. 285; *Smith v. Hodson*, 4 T. R. 217. Assumpsit for money had and received lies only where money has been received. Proof of the receipt of goods or of real estate is not sufficient: *Tuttle v. Mayo*, 7 Johns. 182; *Longchamp v. Kenney*, 1 Doug. 137; *Leery v. Goodson*, 4 T. R. 687; *Whitwell v. Bennell*, 3 Bos. & P. 559; *Pickard v. Bankes*, 13 East, 20; *Ralston v. Bell*, 2 Dall. 242; *Young v. Adams*, 6 Mass. 182; *Taylor v. Higgins*, 3 East, 169; *Cumming v. Hackley*, 8 Johns. 159; *Floyd v. Day*, 3 Mass. 403 [3 Am. Dec. 171]; *Randall v. Rich*, 11 Id. 494; *Beardsley v. Root*, 11 Johns. 464 [6 Am. Dec. 386]; *Fanning v. Chadwick*, 3 Pick. 423 [15 Am. Dec. 233.]

Wood, contra.

By Court, PARKER, C. J. It does not appear that at the trial there was any controversy about the title of the parties to the land from which the wood was taken, the price of which was sued for in this action. If that had been the point in dispute, the plaintiff might have been nonsuited, and turned over to his writ of entry or petition for partition. The action proceeded on the admitted fact that the plaintiff and defendant were tenants in common of certain land, and the question was, whether the wood was taken from that land, and if so, whether the defendant was liable for a moiety of the proceeds. We think the objection since raised, that the action involved the question of title to real estate, cannot now be made.

As to the objection founded on the statute of limitations, we think the jury were instructed right, viz., that the statute began to run from the time when the money was received, and not from the time of the sale of the wood. In this action, the plaintiff affirms the sale, and asks for his share of the proceeds. He had a right to waive his action of trespass given by the statute, and to consider the defendant as his agent in disposing of the wood. This is for the benefit of the defendant, as he can deduct all reasonable charges, and is answerable only to the extent of funds which he has received.

In regard to the objection that the price of some of the wood was received in real estate, we think, as the sale was made for money, the defendant was answerable for the price when he discharged the purchaser, whether he received cash or anything else. He may be considered as the purchaser of the real estate with the money for which he sold the wood. The plaintiff consents to the sale for money, but not that real estate should be substituted. Suppose after selling the wood for money to be paid at a future day, the defendant had set off a debt which he owed the purchaser for the price; he would virtually have received the money. So he has by taking the real estate.

A FURTHER REPORT OF THIS CASE appears in 9 Pick. 34, in which a motion for a new trial was made on the ground of a mistake made by a witness, who testified that the leases of the lots in severalty adjoining those in common was by parol, whereas it was now discovered that they were in writing; and on the further ground that the lessees, the purchasers of the wood, in cutting the timber, had gone beyond the line of the lot owned by the defendant in severalty, and had cut wood on the land held in common, therefore making themselves answerable as trespassers. The motion was resisted on the ground that the defendant, having received money for the wood cut on the lands held in common, had ratified the doings of his lessees, and was liable in this action for money had and received. The following opinion was delivered by the court, Putnam, J., dissenting:

"We suppose the fact very likely to be true that the defendant intended to confine the lessees to his own land, and that they went over the bounds by mistake; but that is not material, for this is an action for money had and received by the defendant, brought to recover the proceeds of wood belonging to the plaintiffs' testator. We think there can be no question but that if there are two tenants in common, and one of them take money for the common property, whether by design or mistake, he is answerable in *assumpsit* to his co-tenant."

Judgment according to verdict.

BOSTON TYPE AND STEREOTYPE FOUNDRY COMPANY v. MORTIMER.

[7 PICKERING, 166.]

ONE SUMMONED AS TRUSTEE, WHO WAS INDEBTED TO THE DEFENDANT at the time of the service of the writ, but who is obliged, before making his answer, to pay a note of the defendant's on which such trustee was indorser, may set off the amount of such note against the debt due to the defendant in respect to which he is summoned.

TRUSTEE process against Chapin, a supposed debtor of Mortimer. The facts considered to discharge said Chapin from his indebtedness to Mortimer appear from the opinion.

Russell, for the plaintiffs, cited *Jarvis v. Rogers*, 15 Mass. 414; *Allen v. Megguire*, 15 Id. 490.

Chapin, *pro se*, referred to *Cushing v. Gore*, 15 Mass. 69; *Hathaway v. Russell*, 16 Id. 473.

By Court, PARKER, C. J. It appears by the answer that, at the time of the service of the writ, there was a small balance of accounts due from the respondent to the debtor, and that at the same time the respondent was liable to the Taunton bank for the debtor to a much larger amount, on a negotiable note indorsed by him at the request and for the benefit of the debtor. It further appears that before the answer the debtor had failed, and that the respondent had been called upon, and being legally obliged to pay, had paid the amount of the note, and had no indemnity or security therefor. Under these circumstances we think he can not be held as trustee; for it would be against justice that he should be held to pay a creditor of his debtor the only money by which he can partially indemnify himself. This question has not before arisen, but we think it quite consistent with the object and views of the legislature, and with the general tenor of the statute, that if before final answer the debtor becomes indebted to the respondent on any contract entered into before the service of the writ, the latter shall have a right of set-off, and be chargeable only with the final balance, if one should be due.

The principles sanctioned by the court in the case of *Hathaway v. Russell*, 16 Mass. 479, warrant the above conclusion. This decision will not reach the case of a liability incurred after the service of a writ, or where the effect of such liability may be avoided by reasonable diligence on the part of the person liable, to procure the payment of the debt by the principal; nor where it is contingent, whether the liability will ever be enforced or not; but we confine it to such a case as we have before us, in which there was an actual liability before the service of the writ, and an actual payment by necessity before the answer.

The respondent in a trustee process ought not to be placed in a worse situation than he would be in if the principal had sued him for the debt; and if the principal had sued him, although he could not file a claim in set-off after entry of the action against him, yet if at any time before judgment the plaintiff in the suit had become indebted to him for money paid on a liability incurred before the suit, upon showing this

matter to the court, and that the plaintiff had failed and was unable to pay, he would obtain a continuance that he might bring a cross action, so as to have a set-off of judgments or executions, unless there should be special causes for refusing this relief: *Hathaway v. Russell*, 16 Mass. 473.

HAYWARD v. LEONARD.

[7 PICKERING, 181.]

QUANTUM MERUIT.—Where one has entered into a special contract to perform work for another and to furnish materials, and the work is done, and the materials are furnished, but not in the manner stipulated, so that he can not recover on the contract, yet if the work and materials are of any benefit to the other party, a recovery may be had on a *quantum meruit* for the work and a *quantum valebant* for the materials.

PRINCIPLE APPLIED TO A CONTRACT FOR BUILDING A HOUSE, and the measure of damages fixed at the contract price, deducting therefrom so much as the house was worth less on account of the departure from the contract.

ASSUMPSIT. The first count was on a conditional promissory note, to be void if the plaintiff failed to perform a certain agreement, of even date with the note, to build a house for defendant, of certain size, by a certain day, and in a specified manner, and contained an averment of performance. Another count was for work done and materials furnished, and upon a *quantum meruit* for building a house on the defendant's land, at his request. There were also the common money counts, and counts upon two other promissory notes. It appeared in evidence, under the general issue, that the plaintiff erected a house upon the defendant's land, within the time and of the dimensions stated in the contract, but varying in workmanship and materials from the terms of the agreement. The defendant lived near the place where the house was erected. He visited the place nearly every day during the progress of the work, and sometimes oftener, and had an opportunity of seeing all the materials as they were used and all the work as it was done. He objected to parts of the work, but afterwards continued to give directions about the house, and particularly directed some variations from the contract. With much of the work he expressed himself from time to time as satisfied, but said that he was no judge of such work. Soon after the completion of the house the defendant refused to accept. There was no evidence to show that the plaintiff had any knowledge that the defendant did not in-

tend to accept the house after it was completed. Evidence of the value of the house as finished was received against the defendant's objection. Evidence of certain payments made on the contract by the defendant was introduced.

In order to bring the question of law before the whole court, Morton, J., before whom the action was tried, instructed the jury to find a verdict for the plaintiff for the sum which, in their opinion, the house was worth to the defendant when it was completed, deducting the payments made. Verdict accordingly. The defendant excepted.

W. Baylies, for the defendant. The action can not be maintained, the contract not having been fulfilled: *Ellis v. Hamlin*, 3 Taunt. 52; *Jennings v. Camp*, 13 Johns. 94 [7 Am. Dec. 367]; *Clark v. Smith*, 14 Id. 326; *Champlin v. Buller*, 18 Id. 169; *Faxon v. Mansfield*, 2 Mass. 147; *Whiting v. Sullivan*, 7 Id. 107; *Stark v. Parker*, 2 Pick. 167 [13 Am. Dec. 425]; *Taft v. Montague*, 14 Mass. 282 [7 Am. Dec. 215]; *Hulle v. Heightman*, 2 East, 145; *Damer v. Langton*, 1 Carr. & Payne, 168. The rule of damages was wrong.

Eddy and Beal, contra. The action will lie for the work actually done: *Cook v. Munstone*, 4 Bos. & P. 355; *Payne v. Bacombe*, 2 Doug. 651; *Keyes v. Stone*, 5 Mass. 391; *Tuttle v. Mayo*, 7 Johns. 132; *Limingdale v. Lington*, 10 Johns. 36; *Jewell v. Schroepel*, 4 Cowen, 564. The acquiescence of the defendant in the work, as performed, gives the plaintiff a right of action: *Farnsworth v. Garrard*, 1 Campb. 38; *Okell v. Smith*, 1 Stark. 107; *Fisher v. Samuda*, 1 Campb. 190; *Grimaldi v. White*, 4 Esp. 95; *Kimball v. Cunningham*, 5 Mass. 502 [3 Am. Dec. 230]; *Conner v. Henderson*, 15 Id. 319. The rule of damages was right: 2 Dane's Abr. 45.

By Court, PARKER, C. J. In this case there is a great array of authorities on both sides, from which it appears very clearly that different judges and different courts have held different doctrines, and sometimes the same court at different times. The point in controversy seems to be this: Whether, when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and materials furnished, but not in the manner stipulated for in the contract, so that he can not recover the price agreed by an action on that contract, yet nevertheless the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labor done,

and on a *quantum valebant* for the materials? We think the weight of modern authority is in favor of the action, and that, upon the whole, it is conformable to justice, that the party who has the possession and enjoyment of the materials and labor of another shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed, and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used or profitably rented, there having been no prohibition to proceed in the work after a deviation from the contract has taken place, no absolute rejection of the building, with notice to remove it from the ground, it would be a hard case indeed if the builder could recover nothing. And yet he certainly ought not to gain by his fault in violating his contract, as he may if he can recover the actual value; for he may have contracted to build at an under price, or the value of such property may have risen since the contract was entered into. The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the price good, deducting the loss or damage occasioned by the variation from the contract; as in the case of *Smith* against the proprietors of a meeting-house in Lowell, determined at March term, 1829, in Suffolk.¹

The cases cited from our own books which are supposed to militate against this doctrine are not of that character. In the case of *Faxon v. Mansfield and Holbrook, his Trustees*, 2 Mass. 147, it was decided that Holbrook owed Mansfield nothing, because Mansfield, having contracted to build a barn, voluntarily left it unfinished, and the sum remaining unpaid was not more than sufficient to pay for the labor necessary to finish it. In the case of *Thft v. The Inhabitants of Montague*, 14 Mass. 282, the bridge was so built as to be useless, and there was no evidence that the materials came to the hands of the defendants. In the case of *Stark v. Parker*, 2 Pick. 267 [13 Am. Dec. 425], the plaintiff was not allowed to recover on a *quantum meruit*, because he had stipulated to labor for a year, and before the expiration of the time, voluntarily and without fault of Parker, left his service. These are very different from cases like the present, where the contract is performed, but, without intention, some of the particulars of the contract are deviated from.

1. *Smith v. First Cong. M. H.*, 3 Pick. 178.

It is laid down as a general position in Buller's *Nisi Prius*, 139, that if a man declare upon a special contract and upon a *quantum meruit*, and prove the work done but not according to the contract, he may recover on the *quantum meruit*, for otherwise he would not be able to recover at all. Mr. Dane (vol. 1, p. 223) disputes this doctrine, and thinks it can not be law unless the imperfect work be accepted. Buller makes no such qualification; and yet it would seem to be reasonable that if the thing contracted for was a chattel, the party for whom it was made ought not to be held to take it and pay for it unless it is made according to the contract; as, a ship, a carriage, etc.; and this principle seems to be of common use in regard to articles of common dealing, such as wearing apparel, tools, and implements of trade, ornamental articles, furniture, etc. There seems to be, however, ground for distinction in the case of buildings erected upon the soil of another, for in such case the owner of the land necessarily becomes owner of the building. The builder has no right to take down the building or remove the materials; and though the owner may at first refuse to occupy, he or his heirs or assignees will eventually enjoy the property. And in such cases the doctrine of Buller is certainly not unreasonable. The case put by Buller to illustrate his position is that of a house built on contract, but not according to it.

Mr. Dane's reasoning is very strong in the place above cited, and subsequently in vol. 2, p. 45, to show that the position of Buller, in an unlimited sense, can not be law; and some of the cases he puts are decisive in themselves. As if a man who had contracted to build a brick house, had built a wooden one, or instead of a house, the subject of the contract, had built a barn. In these cases, if such should ever happen, the plaintiff could recover nothing without showing an assent or acceptance, express or implied, by the party with whom he contracted. Indeed, such gross violations of contract could not happen without fraud, or such gross folly as would be equal to fraud in its consequences. When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valsbant*, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence may be exceptions.

In looking at the evidence reported in the case, we see strong

grounds for an inference that the defendant waived all exceptions to the manner in which the work was done. He seems to have known of the deviations from the contract—directed some of them himself—suffered the plaintiff to go on with his work—made no objection when it was finished, nor until he was called on to pay. But the case was not put to the jury on the ground of acceptance or waiver, but merely on the question, whether the house was built pursuant to the contract or not; and if not, the jury were directed to consider what the house was worth to the defendant, and to give that sum in damages. We think this is not the right rule of damages; for the house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price as the house was worth less on account of these departures.

And upon this ground only, a new trial is granted.

QUANTUM MERUIT UNDER SPECIAL CONTRACT.—There is, perhaps, no more vexatious question in the adjustment of the rights of parties to contracts than in determining what, if any, compensation should be paid to one who, in pursuance of the terms of a special contract, has parted with some value, or bestowed some labor to the benefit of another, but has failed to comply with the requirements on which he has engaged that payment therefor shall depend. By the strict rule of the common law, where one had contracted to deliver certain described articles within a certain period, and payment was not to be made until the entire delivery, or to serve another for a specified time for a compensation for the whole period to be paid at its close, or to perform labor and furnish materials of a stipulated quality and quantity, to be paid for at the completion of the work, it was a settled rule that the full performance on the one part was a condition precedent to the right to recover for the services performed or articles furnished. For a part performance no recovery could be had. This was said to be of the nature of entire contracts, that he who asked any benefit under them must first show that he himself was not in default. The rigor of this rule has been much relaxed in different States of the Union, though in many it is still strictly enforced. A tendency, however, is observable in recent adjudications to administer an equitable relief to the parties, rather than to hold them to the very letter of their engagements.

One of the earliest judicial examinations of this troublesome question was made by Chief Justice Parker, in *Britton v. Turner*, 6 N. H. 481. The contract there analyzed was one of service, and the conclusion reached that the laborer, though voluntarily leaving before his term expired, could recover on his *quantum meruit*. The decision, although adopted in a few States, is not followed in the majority of them; but in all instances the elaborate and closely argued opinion there delivered is adverted to with great respect. That the conclusions there announced should be so much at variance with those that have been reached from a similar state of facts in other instances, makes the decision one of great interest. It is, in fact, considered a leading case on this subject in this country. This was the contract submitted for

the consideration of the court: The plaintiff agreed to work for the defendant for the term of one year, the defendant agreeing to pay for the year's labor the sum of one hundred and twenty dollars. The plaintiff worked for nine months, and then left the defendant's service without his consent. For the value of the services for the period while in the defendant's employ the plaintiff brought assumpsit for work and labor performed. Judge Parker expressed the opinion of the court in an elaborate argument, of which the following is a part: "It may be assumed that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant for the term of one year for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract. It is clear that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed. But the question arises, Can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in *quantum meruit*? Upon this and other questions of a similar nature the decisions to be found in the books are not easily reconciled. It has been held upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract by performing the whole labor contracted for, is not entitled to recover anything for the labor actually performed, however much he may have done towards the performance, and this has been considered the settled rule of law upon this subject: *Stark v. Parker*, 2 Pick. 267 [13 Am. Dec. 425]; *Faxon v. Mansfield*, 2 Mass. 147; *McMillan v. Vanderlip*, 12 Johns. 165 [7 Am. Dec. 299]; *Jennings v. Camp*, 13 Id. 94 [7 Am. Dec. 367]; *Reab v. Moor*, 19 Id. 337; *Lantry v. Parks*, 8 Cowen, 63; *Sinclair v. Bowles*, 9 Barn. & Cress. 92; *Spain Arnot*, 2 Stark. 256.

"That such a rule on its operation may be very unequal, not to say unjust, is apparent. A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non-performance, which in many instances may be trifling, whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance, although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage, is in fact subjected to a loss of all which has been performed in the nature of damages for the non-fulfillment of the remainder upon the technical rule, that the contract must be fully performed in order to a recovery of any part of the compensation. By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action. The case before us presents an illustration. * * *

"There are other cases, however, in which principles have been adopted leading to a different result. It is said that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth: 2 Stark. Ev. 97, 98; *Hayward v. Leonard*, 7 Pick. 181; *Smith v. First Cong. Meeting*

House in Lowell, 8 Id. 178; *Jewell v. Schroepfel*, 4 Cowen. 564; *Hayden v. Madison*, 7 Greenl. 78; Bull. N. P. 139; 4 Bos. & P. 355; 10 Johns. 36; 13 Id. 97; 7 East, 479. * * * Those cases are not to be distinguished in principle from the present unless it be in the circumstance, that where the party has contracted to furnish material and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it was built may refuse to receive it, elect to take no benefit from what has been performed, and therefore if he does receive, he shall be bound to pay the value, whereas in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract under an expectation that it will be fulfilled, and can not, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

"But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with the knowledge also that the other may eventually fail in completing the entire term. If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house. * * *

"If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing; and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law can not and ought not to raise an implied promise to pay. But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received: *Farnsworth v. Garrard*, 1 Camp. 38. And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent.

"In fact, we think the technical reasoning that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it—that the contract being entire there can be no apportionment—and that there being an express contract, no other can be implied, even upon the subsequent performance of service, is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe that the general understand-

ing of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary. Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements can not be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect: *Boone v. Eyre*, 1 H. Bl. 373, note; *Campbell v. Jones*, 6 T. R. 570; *Ritchie v. Atkinson*, 10 East, 295; *Burn v. Miller*, 4 Taunt. 745. It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretense for a recovery, if he voluntarily deserts the service before the expiration of the time."

And the measure of the employer's liability, which can not, it is said, exceed the contract price for the service, is thus estimated by Judge Parker: "The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defense, he is entitled so to do, and the implied promise which the law will raise in such case is to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a completion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfillment of the contract."

The gist of the decision is that a servant may voluntarily, without the consent of his employer, leave his service before the term has expired for which hire was agreed to be paid, and recover the value of his services while actually employed. This doctrine is quoted and adopted in *Lowe v. Sinklear*, 27 Mo. 310, and the measure of damages followed in *Lee v. Ashbrook*, 14 Id. 378; *Downey v. Burke*, 23 Id. 228; *Lamb v. Brolaski*, 38 Id. 51; *Koeltz v. Bleckman*, 46 Id. 321, and also adopted in *Coe v. Smith*, 4 Ind. 79; *Ricks v. Yates*, 5 Id. 117; *Wolcott v. Yeager*, 11 Id. 84.

It is, however, a somewhat significant commentary upon the intrinsic value of the opinion entertained by Chief Justice Parker, that such language as the following should be used by his own court at a later period of its existence: "Whatever might be the views of the court as at present organized, in a case like that of *Britton v. Turner*, and however much even some may think it to be regretted that the rule of law there laid down was allowed to obtain, still, considering that it has remained as the law of the state for nearly twenty years, and has never been overruled, and that while it has the strong feature of its direct tendency to the willful and careless violation of express contracts fairly entered into, to lead to its condemnation and disapproval, it has also some features of advantage and strong justice to recommend it. We, on the whole, are not inclined to disturb the doctrines of that case, but to adopt and apply them:" *Per* Chief Justice Woods, in *Davis v. Barrington*, 30 N. H. 517, 529.

The prevailing rule in regard to the contract for personal service, is other than as stated in the New Hampshire case. As generally enunciated, one who agrees to serve another for a specified time for a salary to be paid upon the expiration of such term of service, and who voluntarily, against his employer's consent and without cause, leaves the employment before the end of the term, can recover nothing for the service he may have rendered: *Lantry v. Parks*, 8 Cow. 63; *Smith v. Brady*, 17 N. Y. 173; *Olmstead v. Beale*, 19

Pick. 528; *Thayer v. Wadsworth*, Id. 349; *Davis v. Maxwell*, 12 Met. 290; *Stark v. Parker*, 2 Pick. 267; *Henson v. Hampton*, 32 Mo. 408; approving *Posey v. Garth*, 7 Id. 96; *Dickson v. Caldwell*, 17 Id. 595; *Schnerr v. Lemp*, 19 Id. 40; *Brown v. Fitch*, 33 N. J. L. (4 Vr.) 418; *Bragg v. Town of Bradford*, 33 Vt. 35; *Patnote v. Sanders*, 41 Vt. 66; an example of waiver of the abandonment of the contract by the servant: *Eldridge v. Rowe*, 2 Gilman, 91. This last case was on all fours with *Britton v. Turner*, 6 N. H. 481, but the court came to a precisely opposite conclusion. Rowe agreed to work on Eldridge's farm for the term of eight months, for the sum of ninety dollars, but left the employment and ceased work at the end of four months, without the consent and without fault on the part of Eldridge. In an action on the *quantum meruit* against Eldridge, the court, *per* Young, J., adverts to the distinction between that class of cases where the party voluntarily receives the benefit of the labor or materials furnished by another, it being in his power to abandon the same, and renounce the contract *in toto*, because the terms of the contract have not been complied with, and that class where the party could not abandon the same, but must, without parting with his own property, enjoy in a measure the benefits of a partial performance of the contract. In the first instance, the voluntary retention of the benefit of another's labor, or of articles furnished by him, will, it is said, impose a liability of paying therefor in an action upon a *quantum meruit*; but in the other case, a different principle is invoked. In illustration of the statements made, it is said: "If a person agree to work upon the plantation of another, in the performance of such services generally as are incident to the art of husbandry, here his labor, upon a failure to perform his agreement, would have become so incorporated with the soil, and so mixed up with the general concerns of the farm, as not to be susceptible of separation and abandonment, and the employer, as a necessary consequence, may avail himself of its benefits, if any, without danger of being subjected to an action for the work thus imperfectly or defectively performed." And applying the principles to the facts then under consideration, it is concluded: "Testing this case by the rules prescribed in similar cases, it is obvious that the plaintiff below had no legal right to recover for the four months' labor he had performed. He had agreed to labor on the farm of Eldridge for the term of eight months, for the sum of ninety dollars, and he has not performed his agreement; and it is no objection to say that Eldridge has received the benefit of his labor, this being a case where, from its nature, Eldridge could not separate the products of his labor from the general concerns of his farm, and ought not, therefore, to be responsible to any extent whatever, for not doing that which was impossible." And in *Smith v. Brady*, 17 N. Y. 173, contracts for service are cited as illustrations of that class of contracts where the retention of the benefit received is not a waiver of the failure by the other party to perform, for the very reason that it was a benefit of a character that could not be returned; and the keeping it would furnish no presumption that payment would be made therefor.

Where, however, the absence from the defendant's employ is occasioned by the act of God, by sickness, or by death, the plaintiff may recover the worth of his labor during the time of his actual stay with the defendant. The courts all recognize the injustice of imposing upon a man, in addition to the calamities of nature, the added misfortunes of a deprivation of the fruits of his toil. Instances in which this rule has been invoked where sickness was the cause of the abandonment of the service, are *Fuller v. Brown*, 11 Met. 440; *Ryan v. Dayton*, 25 Conn. 188; *Green v. Gilbert*, 21 Wis. 395;

Hillyard v. Crabtree, 11 Tex. 264; *Fenton v. Clark*, 11 Vt. 557; *Seaver v. Morse*, 20 Id. 620; *Coe v. Smith*, 4 Ind. 79; *Wolfe v. Howes*, 20 N. Y. 197. But if the sickness could have been anticipated, as the confinement of a woman with child, this exception to the general rule that the servant must work the full time before he can demand remuneration is not made: *Jennings v. Lyons*, 29 Wis. 553. In case of a person's death during the term, his representatives may recover the benefit received by the employer on account of the decedent's labors: *Ricks v. Yates*, 5 Ind. 117; *Persons v. McIlben*, Id. 261. Should the servant recover from his illness before his term has ended, it is not essential to his recovery of the value of his services during the time of actual labor, that he should offer to return: *Fenton v. Clark*, 11 Vt. 557; *Seaver v. Morse*, 20 Id. 620. In *Jones v. Judd*, 4 Comst. 412, where the contract for work and labor was put an end to before its time for completion, by an act of the legislature the person performing the work and labor was held entitled to recover compensation therefor. And generally, if the prevention of the continuance of the service was occasioned by the act of the employer without cause, he will be liable for the work performed on a *quantum meruit*, or, as is held in some case, for the contract price in the contract. See citations below. *Hillyard v. Crabtree*, 11 Tex. 268; *Cox v. Western P. R. R. Co.*, 47 Cal. 87; *Jones v. United States*, 96 U. S. 27. It has been decided that, as an infant's contract for service is voidable, he may abandon the contract and sue for the value of his labor, as if no contract had been entered into: *Deroche v. Continental Mills*, 58 Me. 217.

In other special contracts, as for building purposes, or the delivery of specific articles, the greatest difficulty seems to have been experienced. New York, which stoutly maintained for many years that one who has entered into an entire contract, making payment depend upon performance, must show full performance before a recovery could be had, is apparently gradually relaxing this rule. Other states are more in harmony with the spirit of the principal case which is followed as an undoubted authority in very recent decisions of Massachusetts. For example, under the common counts in *indebitatus assumpsit* at common law, or under a count on an account annexed under the new practice act of Massachusetts, it is well settled in that commonwealth, says Chief Justice Gray, in *Cullen v. Sears*, 112 Mass. 299, 308, that "the measure of recovery for the building a house according to a special contract, which has been substantially performed except in some comparatively slight deviations, is the contract price deducting what the house was worth less to the defendant by reason of such deviations." Citing the principal case, and *Morse v. Potter*, 4 Gray, 292; *Walker v. Orange*, 16 Id. 193; *Cardell v. Bridge*, 9 Allen, 355; *Powell v. Howard*, 109 Mass. 192. The same rule of damages is adopted in *Moulton v. McOwen*, 103 Mass. 591, 598; *Walker v. Inhabitants of Orange*, 16 Gray, 193, an action by a contractor against a town for laying out a road, which the town commissioners refused to accept; *Higby v. Upton*, 3 Met. 411; *Van Deusen v. Blum*, 18 Pick. 229; *Adams v. Nichols*, 19 Id. 280. Adopting this Massachusetts rule is *White v. Oliver*, 36 Maine, 92, citing the principal case, and *Jewett v. Weston*, 11 Me. 346; *Jewell v. Schroepfel*, 4 Cowen, 564; *Ladue v. Seymour*, 24 Wend. 60; *Snow v. Ware*, 13 Met. 49; *Lucas v. Goddwin*, 3 Bing. N. C. 737.

Rule in Vermont: "The doctrine is firmly established in this state that where a contract has been substantially though not strictly performed; where the party failing to perform according to the terms of this contract, has not been guilty of a voluntary abandonment or willful departure from the contract; has acted in good faith, intending to perform the contract according to its

stipulations, but has failed in a strict compliance with its provisions, and where from the nature of the contract and of the labor performed, the parties can not rescind and stand in *statu quo*, but one of them must derive some benefit from the labor or money of the other; in such case the party failing to perform his contract strictly may recover of the other, as upon a *quantum meruit*, for such a sum only as the contract as performed has been of real and actual benefit to the other party, estimating such benefit by reference to the contract price of the whole work. This is a relaxation of the ancient law, standing upon the solid grounds of necessity and equity, but to be guarded with care lest in its application it should tend to relax or impair the obligation and faithful performance of agreements." *Bragg v. Town of Bradford*, 33 Vt. 35, 38, per Aldis, J. After citing several decisions, furnishing illustrations of the application of this doctrine, *Dyer v. Jones*, 8 Vt. 205, called "a leading case;" *Brackett v. Morse*, 23 Vt. 554; *Morrison v. Cummings*, 26 Id. 486; *Hubbard v. Belden*, 27 Id. 645; *Barker v. The Troy and Rutland R. R. Co.*, Id. 780; *Swift v. Harriman*, 30 Id. 607; *Kettle v. Harvey*, 21 Id. 301, the rule by which compensation is to be made for the partial performance of the contract, is thus framed: "The party failing to perform can only recover such a sum as his labor has benefited the other party. Had he strictly and literally kept his agreement he would have been entitled to the contract price. Failing in this—first, he must deduct from the contract price such a sum as will enable the other party to get the contract completed according to its terms; or, where that is impossible or unreasonable, such a sum as fully compensates him for the imperfection in the work, and the insufficiency of materials, so that he shall in this respect be made as good pecuniarily as if the contract had been strictly performed. 2. The party failing to perform must also deduct from the contract price whatever additional damages his breach of the contract may have occasioned to the other."

In Iowa this same measure of damages subsists: *Corwin v. Wallace*, 17 Iowa, 374; *Tait v. Sherman*, 10 Id. 60. And seems to afford a just rule for the protection of the rights of both parties, where any relaxation of the strict common law doctrine will be permitted.

In *Homer v. Wilson*, 7 Mich. 294, this rule of damages is laid down by Judge Christiancy: "In the case of a contract for a certain amount of labor, or for work for a specified period—when the labor is to be performed on the materials or property, or in carrying on the business of the defendant, or when the defendant has otherwise accepted or appropriated the labor performed, if the defendant prevent the plaintiff from performing the whole, or wrongfully discharge him from his employment, or order him to stop the work, or refuse to pay, as he has agreed when payments become due in the progress of the work, or disable himself from performing, or unqualifiedly refuse to perform his part of the contract, the plaintiff may, without further performance, elect to sue upon the contract and recover damages for the breach, or treat the contract as at an end, and sue in general assumpsit for the work and labor actually performed: *Hall v. Rupely*, 10 Barr. 231; *Moulton v. Trask*, 9 Metc. 579; *Derby v. Johnson*, 21 Vt. 21; *Canada v. Canada*, 6 Cush. 15; *Draper v. Randolph*, 4 Harrington, 454; *Webster v. Enfield*, 5 Gilm. 298. And in such cases he may, it would seem, under the common *indebitatus* count, recover the contract price, where the case is such that the labor done can be measured or apportioned by the contract rate; or whether it can be so apportioned or not, he may, under the *quantum meruit*, recover what it is reasonably worth." And, again, in an earlier decision, it is said: "Without reviewing the cases in detail, we think that the only rule which harmonizes them may be laid down substantially as follows: The defaulting plaintiff can in no case recover

more than the contract price, and can not recover that, if his work is not reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract. The party in default can never gain by his default, and the other party can never be permitted to lose by it, and the price thus determined is the true amount recoverable on a *quantum meruit*." *Allen v. McKibbin*, 5 Mich. 455. Both of these cases are referred to approvingly in the later adjudication of *Begole v. McKensie*, 26 Mich. 473.

That there should have been good faith on the part of the one seeking to recover for a part performance, and no willful departure from the terms of the contract, and that even in such case there should be a voluntary retention of the benefit received, are deemed in these decisions essential incidents of the plaintiff's right to recover. So also *McKinney v. Springer*, 3 Ind. 65; *Epperly v. Bailey*, Id. 72; *McClure v. Secrist*, 5 Id. 31. It is the retention of the benefit that constitutes the bone of contention. What is a voluntary retention, is the difficult question. The course of the New York decision will now be traced, in a degree, as illustrating the strict application of the ancient rules and the gradual seeming modification. There, the rigor of the rule that holds a party to a strict compliance with the terms of his contract, before he can look to the other contracting party for compensation, has been but little relaxed. It is observable that the doctrine prevailing in that state rests on the grounds of adjudicated cases; *stare decisis* seems to have been the turning point in *Champlin v. Rowley*, 13 Wend. 256; S. C., in error, 18 Id. 187; a leading authority in New York. The facts there presented were: Champlin agreed to sell one hundred tons of pressed hay, to deliver the same to Rowley within a given period, for which he agreed to pay at a specified price, one hundred dollars in advance, and the residue when the whole quantity should be delivered. Champlin delivered fifty tons within the time; but, on account of the river closing so that navigation was impossible, the residue of the hay was not delivered. Champlin then sued for the value of the hay that had been delivered, and was held not entitled to recover.

In the court of errors, Chancellor Walworth said: "If an action can be sustained in such a case by the party who has failed to perform his contract, without any fault, or acquiescence, or waiver, of a strict performance by the party who has received the benefit of the part performance, it must be upon the equitable principle recognized by the supreme court of New Hampshire, in *Britton v. Turner*, 6 N. H. 492. The principle adopted in the case referred to is, that it is unconscientious and inequitable for a party who has been actually benefited by the part performance of a contract, above or beyond the damages he has sustained by the non-performance of the residue of the agreement, to retain this excess of benefit without making the other party a compensation therefor, and that this excess of benefit, arising from the part performance of the other party, forms a new consideration upon which the law implies a promise to pay for the same, and which excess of benefit therefore may be recovered in the equitable action of assumpsit. But if the nature of the part performance is such that the other party can reject the benefit received therefrom, as by offering to return specific articles received in part performance, but not actually converted or used, he is at liberty to do so, and to reserve his remedy for the non-performance of the contract. Courts of equity sometimes act upon a similar principle in relieving a party against a penalty or forfeiture arising from misfortune or the neglect of a party to perform his agreement, and perhaps, in some cases, it has been done where the forfeiture was incurred willfully and intentionally, without any pretense of excuse arising from mistake or inability to perform. With the exception of this last

class of cases, if courts of justice were at liberty to make new laws, instead of administering those which are already in existence, and upon which the contracts of the parties litigant are supposed to be founded, or if this was a new question, upon which a court in this state was now to pass for the first time in settling a principle upon the flexibility of the common law as applied to new cases, I see no reasonable objection to the transferring these principles of the court of chancery to courts of common law, in cases of mere personal contracts, founded upon agreements relative to the sale or transfer of an interest in real estate. But I consider this question as settled in this state by a uniform course of decisions for the last twenty-five years, during which time the laws have undergone a most thorough revision by the legislature, without any attempt to change the law in this respect, as settled by the supreme court. I think it belongs, therefore, to the legislature, and not to this court, to make a change in the law in this respect, if such a change is deemed to be expedient and useful to the community. The only possible objection I can perceive to such a change is, that it may be strong temptation to negligence in the performance of personal contracts, as the known practice of the court of chancery unquestionably is with respect to agreements for the sale or purchase of real property. The conclusion at which I have arrived on the question as to the plaintiff's right to recover at all in such a case, which was the principal question before the supreme court, entitles the defendant to a judgment upon this special verdict upon the facts found thereby."

The next decision elaborately considered, in which Judge Comstock delivered the following concurring opinion, is *Smith v. Brady*, 17 N. Y. 173, 187. It was a building contract, not completed according to its terms; but it appears that the structure had been occupied by the defendant, which fact was relied upon as an acceptance and waiver of non-performance: "But the rule, as it is well settled with us, allows a party to retain without compensation the benefits of a partial performance, where, from the nature of the contract, he must receive such benefits in advance of a full performance, and by its terms or just construction he is under no obligation to pay until the performance is complete. Thus, if a person engages to perform a year's labor for another, and payment is to be made when the labor is done, in such a case the employer necessarily receives the benefit of each day's service when it is done, yet, if the laborer, without just cause, abandons the service at any time, however short before the year has expired, he can recover no part of his wages," referring to *McMillan v. Vanderlip*, 12 Johns. 165 [7 Am. Dec. 299]; *Thorpe v. White*, 13 Id. 53; *Jennings v. Camp*, Id. 94 [7 Am. Dec. 367]; *Champlin v. Rowley*, 13 Wend. 258; S. C., in error, 18 Id. 187; *Vanderbilt v. Eagle Iron Works*, 25 Id. 655; *Paige v. Ott*, 5 Denio, 406; *Pike v. Butler*, 4 Comst. 360; *Pullman v. Corning*, 5 Seld. 93. "So the contract may be to sell and deliver goods at different times, to be paid for when the whole are received. If the vendor refuses to perform entirely, without good cause, the purchaser is neither bound to pay for nor to return the goods received in part performance: *Champlin v. Rowley*, *supra*. If A. should agree to plow the field of B., consisting of twenty acres, at a given price for the whole service, or at so much per acre, to be paid when the service is done, and after plowing nineteen acres should abandon the contract, he can recover nothing for his work. The owner of the field may enter, sow it with his grain, and reap the harvest, thus enjoying fully the benefits of the part performance. In so doing he waives nothing, because he can not reasonably do otherwise. He is not obliged to abandon his field in order to be enabled to insist upon the condition of the contract. Closely analogous is the case of a building contract. The owner

of the soil is always in possession. The builder has a right to enter only for the special purpose of performing his contract. Each material as it is placed in the work becomes annexed to the soil, and thereby the property of the owner. The builder would have no right to remove the brick or stone or lumber after annexation, even if the employer should unjustifiably refuse to allow him to proceed with the work. The owner, from the nature and necessity of the case, takes the benefit of part performance, and, therefore, by merely so doing, does not necessarily waive anything contained in the contract. To impute to him a voluntary waiver of conditions precedent from the mere use and occupation of the building erected, unattended by other circumstances, is unreasonable and illogical, because he is not in a situation to elect whether he will or will not accept the benefit of an imperfect performance. To be enabled to stand upon the contract he can not reasonably be required to tear down and destroy the edifice if he prefers it to remain. As the erection is his by annexation to the soil, he may suffer it to stand, and there is no rule of law against his using it without prejudice to his rights." And in conclusion, upon the occupancy of the building being a waiver of the failure of the contractor to comply with the conditions precedent to his right to payment, the judge said: "And the law does not adjudge that a mere silent occupation of the building by the owner amounts to a waiver, nor does it deny to him the right so to occupy, and still insist upon the contract. The question of waiver of the condition precedent will always be one of intention, to be arrived at from all the circumstances, including the occupancy."

A still later case is *Gancius v. Black*, 50 N. Y. 145, 148, where C. J. Church spoke the court's opinion. Here an element of relaxation of the old rule appears: "It is well settled in this State that where a party has entered into a contract to perform work and furnish materials of a specified character, and the other party agrees to pay for the same upon the performance of the contract, although the work be performed and materials furnished, yet, if not done in the manner stipulated, no action will lie for compensation. When performance is a condition of payment, the former must be shown to entitle a party to recover, unless it has been waived or released. The case of *Smith v. Brady*, 17 N. Y. 173, reviewing the principal authorities on the subject, is full and explicit on this point. This is a general rule applying to contracts of this character, as well as others. As was said in the above case, 'There is, in a just view of the question, no hardship in requiring builders to perform their contracts in order to entitle themselves to payment, where the employer has agreed to pay only on that condition.' As, however, this class of contracts embraces many particulars which it is difficult if not impracticable to comply with, with entire exactness, the apparent rigor of the general rule has been so far relaxed as that a substantial compliance will be deemed sufficient. As was properly expressed by Allen, J., in *Sinclair v. Talmadge*, 35 Barb. 602, 'If there has been no willful departure from the terms of the contract, or omission in essential points, and the laborer has honestly and faithfully performed the contract in all its material and substantial particulars, he will not be held to have forfeited his right to remuneration by reason of mere technical, inadvertent, or unimportant omissions or defects. The law imposes no such liability, and enforces no such penalty.' The question in each case will, of course, be an open one, where defects exist, whether they are substantial or technical and unimportant. This is a question of fact." This language was referred to with approval, as expressive of the law of that State, in *Phillip v. Gallant*, 62 N. Y. 264.

In New Jersey the strict rule prevails: "Where a contract is entire, the complete performance is a condition precedent to the payment of the price,

and no recovery can be had for a partial performance unless the parties, by mutual consent, have agreed to sever the contract, or the defendant has himself repudiated it, or the plaintiff is justified by some fault of the defendant in abandoning it: *Erwin v. Ingram*, 4 Zab. 519, 523; *Haslack v. Mayers*, 2 Dutcher, 284, 291; *School Trustees v. Bennett*, 3 Id. 513." *Brown v. Fitch*, 33 N. J. L. (4 Vr.) 418, 422.

From a consideration of all these decisions, this doctrine seems to be recognized, or to be growing in favor: Where, under a special contract, a party has in good faith bestowed some labor or parted with some articles to the benefit of another, who has as a matter of fact enjoyed the benefit of the labor or the articles, whether voluntarily or involuntarily, and where the incomplete performance has not been the result of the party's own provoking, or of causes which he might, with ordinary diligence, have provided against, the one receiving such benefit must pay therefor.

SWAN v. NESMITH.

[7 PICKERING, 229.]

WHERE A *DEL CREDERE* COMMISSION is paid to a factor, his agreement to guaranty the sales may be proved by parol.

AMENDING COMPLAINT.—A principal who sues his factor on an *indebitatus assumpsit* and on an *insimul computassent*, may amend his complaint by declaring against the defendant as a simple factor, and likewise as a factor under a *del credere* commission.

ASSUMPSIT. The declaration contained counts on an *indebitatus assumpsit*, for money had and received, and upon an *insimul computassent*. Subsequently the court allowed amendments to the complainant by adding three counts, two against the defendant as a simple factor, and the third against him as a factor under a *del credere* commission. On the trial it appeared that the plaintiffs consigned to the defendants certain goods which they were to sell on commission; that the defendants sold the same, and started an account with the plaintiffs, but that some of the purchasers who had given notes had failed, so that recovery could not be had of them. Parol evidence was then given by the plaintiffs against defendants' objection that the defendants verbally guaranteed the sales. Verdict for the plaintiffs. Motion for a new trial.

Fletcher, for the defendants, contended that the new counts were for different causes of action and should not have been admitted: *Haynes v. Morgan*, 3 Mass. 208; *Willis v. Crooker*, 1 Pick. 204; *Wells v. Ross*, 7 Taunt. 403. That parol evidence was not admissible to prove a promise to answer for the debt, default, or miscarriage of another: *Matson v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Bl. 120; *Peale v. Northcote*, 7

Taunt. 478, and note; *Gall v. Comber*, Id. 558; *Castling v. Aubert*, 2 East, 325; *Chase v. Day*, 17 Johns. 114; *Jackson v. Rayner*, 12 Id. 291; *Leonard v. Vredenburg*, 8 Johns. 29 [5 Am. Dec. 217].

Metcalf, *contra*, in support of the amendment, cited: *Cornwall v. Gould*, 4 Pick. 446; *Ball v. Clafin*, 5 Id. 303; and upon the second proposition urged by counsel, referred to *Perley v. Spring*, 12 Mass. 297; *De Wolf v. Rebaud*, 1 Pet. 476.

By Court, PARKER, C. J. In this case, it is stated in the report that the plaintiff offered the testimony of witnesses on the stand to prove that at the time when the defendants received the goods for sale they agreed verbally to guaranty the sales. This evidence was objected to on the ground that by the statute of frauds, a contract of guaranty, to be binding, must be in writing, and that parol evidence to prove it was not admissible. Now this depends upon the question whether the undertaking of the defendants to guaranty the sales was original or collateral. The defendants were commission merchants, and as such they received the goods for sale in the way of their business. The evidence went to prove that when they received the goods they guarantied the sales; for this they had their commission, and, in the mercantile language, it was a *del credere* commission. The legal effect of such a contract is to make them liable at all events for the proceeds of the sale, so that, according to some of the authorities, though denied by others, they may be charged on *indebitatus assumpsit*, as for goods sold to them. And there seems to be no reason why they should not be so charged, if upon receiving the goods they became accountable, except that their liability is not fixed until a sale is made, and if upon credit not until the time of payment arrives, the goods, too, being at the risk of the vendors, with ordinary care on the part of the factors, until the sale. But as the action can not be sustained until after the sale has taken place, and then there is no legal excuse for not paying, the form of the action does not seem very material. Such is the nature of a commission *del credere* as stated in 3 Chitty on Com. and Manuf. 220, 221, and in Paley on Principal and Ag. 35; *McKenzie v. Scott*, 6 Bro. P. C. 280; *Grove v. Dubois*, 1 T. R. 112; *Bize v. Dickason*, Id. 285. Some of the principles laid down in these books are questioned in *Gall v. Comber*, 7 Taunt. 559, and *Peele v. Northcote*, Id. 478; but it seems nowhere to be required that a guaranty of this nature should be in writing, for the liability is admitted to be original, and although the vendor may in such case forbid

payment to the agent if he is insolvent, and maintain an action for himself, which in other cases is held to be the distinctive mark of a collateral undertaking, yet in this particular contract such a privilege to the vendor is held not to alter the nature of his claim upon the factor.

We assume, from the terms of the report, that the evidence admitted proved such a contract as we have above described, and that the verdict of the jury was founded upon the fact so proved. But on the supposition that the three original counts were not sustained by the evidence, we have considered the objection to the subsequent counts allowed to be filed on leave to amend. They set forth, in different forms, the contract as proved, viz., a promise to guaranty the sales of the goods. This does not appear to us to be a different cause of action from that set forth in the first series of counts. They are attempted to be charged for the same goods in all the different forms, and in all as originally liable for them. The counts are consistent, and for the same cause; the variation is only in the form of liability. It is like the case of *Ball v. Claffin*, 5 Pick. 303 [16 Am. Dec. 407].

Judgment according to verdict.

WEBB v. PEELE.

[7 PICKERING, 247.]

ON AN ASSIGNMENT FOR CERTAIN PREFERRED CREDITORS, of real and personal property, to secure the payment of their debts, the realty must be first applied toward the payment of those debts, the conveyance being absolute on its face, and resort then had to the personalty, the residue being liable for the debts of other creditors of the assignor.

SCIRE FACIAS. Peele, summoned as trustee of Silver, answered that the latter, being in failing circumstances, had assigned to him personalty for the payment of certain specified creditors, any residue to go *pro rata* towards the discharge of debts he was liable for as promisor, indorser, guarantor, or surety; and that he had conveyed to Peele and certain other specified creditors certain lands, absolutely, for a consideration expressed of seven thousand five hundred dollars. It appeared that the personalty was sufficient to pay the debts of these preferred creditors, who had knowledge of, and assented to the conveyances. The value of the land conveyed was estimated at four thousand dollars. The plaintiffs and others had attached the land.

Saltonstall and Cummins, for the plaintiff, urged the point simply whether the defendant was liable as trustee of the real estate and at what value; they did not deny that so much of the property as was necessary should be applied towards the payment of the preferred debts. They contended that the defendant was liable for the value of the realty to the amount of the consideration expressed in the conveyance; *Baker v. Dewey*, 1 Barn. & Cress. 704; *Robinson v. McDonnell*, 2 Barn. & Ald. 134; *Powell v. Monson*, 3 Mason, 257; *Flint v. Sheldon*, 13 Mass. [7 Am. Dec. 162]; *Storer v. Batson*, 8 Id. 431; *Goodwin v. Hubbard*, 15 Id. 218.

L. Shaw and B. Merrill, contra. The sole object of the transfers was to secure debts; the circumstance that the property exceeded the debts does not vitiate the transfer: *Thomas v. Goodwin*, 12 Mass. 140; *Northampton Bank v. Whiting*, Id. 110; *Harrison v. Phillips Academy*, Id. 466; *Hastings v. Baldwin*, 17 Id. 552. The court will marshal the assets, and intend that Peele received the land to be applied at its real value to his own demand: *Pierson v. Weller*, 3 Mass. 564; *Russell v. Lewis*, 15 Id. 127; *Black v. Black*, 4 Pick. 236. The consideration expressed in the deed is not conclusive as to the value of the land: *Wilkinson v. Scott*, 17 Mass. 257; *Davenport v. Mason*, 15 Id. 85; *Rex v. Scammonden*, 3 T. R. 474; *Stratton v. Rastall*, 2 Id. 366; *Bowen v. Bell*, 20 Johns. 338 [11 Am. Dec. 286]; *Hamilton v. McGuire's Exr.* 3 Serg. & R. 355; *Weigley's Admr. v. Weir*, 7 Id. 309; *O'Neale v. Lodge*, 3 Har. & M. H. 433 [1 Am. Dec. 377].

By Court. We are of opinion that the land passed by the deed, there being a valid consideration; that the purpose being to pay debts, it passed in trust; and that it is to be accounted for at its actual value. But the deed being absolute, the land is to be applied to those debts before resort is had to the personal estate; it must be considered as a payment *pro tanto*. If there shall afterwards be a surplus of personal estate, Peele must be charged for it. This can not be ascertained without first coming at the value of the real estate. Perhaps this may be determined by agreement, but if not, the respondent should be allowed an opportunity to sell. We consider the whole property as put into his hands to be applied to the discharge of the debts and liabilities specified, and that he will be liable as trustee for the surplus.

PEELE v. SUFFOLK INSURANCE COMPANY.

(7 PICKERING, 254.)

THE ASSURED OFFERING TO ABANDON and refusing to repair a ship stranded and greatly damaged, will entitle the insurer to repair her, if it can be done for less than half her value, and restore her to the assured. But unless the repairs are made within a reasonable time, the insurer forfeits his right to return her, and must be considered as having accepted the abandonment.

WHETHER TO THE EXPENSE FOR REPAIRS, the jury may add a sum "for damage for leak and straining of the vessel," in order to determine the amount of damage caused by the perils of the sea, *quære*.

ACTION on a policy of insurance on the ship *Argonaut*, for a total loss. The ship, while on the voyage insured, was driven on the rocks near Portsmouth, on the twenty-fourth of March, 1821, and received great damage. While she lay there an offer of abandonment was made on the twenty-sixth of March, 1821. The defendants repaired the vessel and offered to restore her to the plaintiffs. The latter contended that the vessel had not been sufficiently repaired, nor within a reasonable time, and that the expense of the repairs with those still necessary, would exceed fifty per cent. of her value. This was controverted by the defendants; who contended that if there had been some unnecessary delay it would not change a partial to a total loss. The jury were instructed that if there had been an unnecessary delay, they should find as for a total loss. The jury found that the abandonment was justifiable and duly made; that the repairs were insufficient; that the expense and damage exceeded fifty per cent. of the sum named in the policy; and that there had been an unnecessary delay in repairing the ship. Verdict for the plaintiffs. In the estimate returned by the jury of the damage and expenses, was one item of one thousand and five hundred dollars for "damage of leak and straining of vessel not otherwise provided for." Motion for a new trial.

Saltonstall, for the defendants, contended that they had a right to repair the vessel and restore her to the plaintiffs: *Wood v. Lincoln, etc., Ins. Co.*, 6 Mass. 479 [4 Am. Dec. 163]; *Ritchie v. U. S. Ins. Co.*, 5 Serg. & R. 509; *Hart v. Del. Ins. Co.*, Cond's Mars. 281, a, note, 562, note; and if there had been an unreasonable delay, there should have been a new abandonment for that cause: *Suydam v. Mar. Ins. Co.*, 1 Johns. 181 [3 Am. Dec. 307]; *Brown v. Smith*, 1 Dow. 349; *Smith v. Robertson*, 2 Id. 482.

Mason and Nichols, contra. The taking possession and re-

pairing the vessel was an acceptance, by implication, of the abandonment: *Peele v. Merchants' Ins. Co.*, 3 Mason, 27.

By Court, PARKER, C. J. Considering the unfortunate and somewhat singular course of the controversy upon this policy, and the accumulated loss which must inevitably fall upon the unsuccessful party, we regret being obliged to decide it upon narrower grounds than the course of the argument and the expectations of the party would seem to require, but the jury having specifically returned one fact as found by them, and there being no report of the evidence, or motion to set aside the verdict as against evidence, in regard to that fact, we think it decisive of the cause; and whatever might be our opinions upon several other points which may have been raised at the trial, or adjudicated upon in another court, we should be obliged, at last, to settle ourselves down upon this point, and, therefore, it will not be useful to speculate upon the others.

The mode of computation taken by the jury to raise the expense of repairing up to fifty per cent. of the value of the vessel, particularly in assuming a large sum arbitrarily, for the straining and weakening of the ship, after all expenses of repairs were allowed, is of very questionable character, and has been expressly disavowed in the respectable court of a neighboring state: *Sage v. Middleton Ins. Co.*, 1 Conn. 239. Indeed, we can not but think there has been a straining of the cause, as well as of the vessel, in order to charge the underwriter; but of this, for the reason before given, we say no more.

That the ship, at the time of the offer to abandon, was in a state of peril to justify that offer, can not be doubted. She was upon the rocks, and whether she could be got off or not was altogether uncertain. Subsequent events must determine whether the loss was then total or not.

The mere stranding, however perilous, is not of itself a total loss, for the vessel may be relieved and the damage may be small. The assured may, if he please, take measures to get her off, and repair her at the expense of the underwriter in the form of a partial loss, or he may leave her to her fate, trusting to the proof that may entitle him to insist upon his abandonment and indemnity as for a total loss. The underwriter is not, in such circumstances, obliged to accept the offer to abandon; he also may take the chance of the facts as they may appear, and he may, we think, though his right has been questioned, take her into his possession and repair her, the assured refusing to do it, and if he can do this at an expense less than half her

value, he may restore her to the assured, and thus avoid paying for a total loss. It is asked, Who has the property of the vessel and the risk, in case she be destroyed by some cause not within the policy? We say the assured, if it turn out that the loss from the peril insured against was not total.

But the underwriter has his duties as well as his rights; if he take the vessel into his possession to repair her, he must do it as expeditiously as possible, in order that the voyage, if it be not completed, may not be destroyed. If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon. This principle can not well be contested; without it, the underwriter may keep the assured entirely uncertain in regard to his rights and interests, and put his property in jeopardy. The right of the insurer to take into his custody the vessel of the assured without his consent, except under the abandonment, can not exist without the correlative duty to keep her as short a time as possible under the circumstances in which she may be placed. There are no authorities upon this point, nor, indeed, upon the right of the insurer to take the vessel in order to repair her; but the principle rests upon the very nature of the law of insurance, which is a fair and honest indemnity for loss.

Now, the jury have in this case explicitly found that the vessel was not repaired and offered to be restored in a reasonable time; that is, that the underwriter kept her from the assured longer than was necessary to put her in a navigable state, so that she could perform her voyage, or be as safe and sound as she was before her state of peril. We know not the evidence by which they came to this conclusion, but it being in legal contemplation the fact, we think thereby they made the vessel their own by a constructive acceptance of the abandonment. If we were to decide otherwise, we should declare the law to be, that where a vessel has incurred a peril which justifies an offer to abandon, the underwriter may take her into his possession, and keep her as long as he pleases, and then restore her and avoid paying a total loss; which can not be the law.

ABANDONMENT, WHEN CAN BE MADE.—See *Depau v. Ocean Ins. Co.*, 15 Am. Dec. 431, and note; *Hyde v. La. State Ins. Co.*, 14 Id. 196; *Brewer v. Union Ins. Co.*, 7 Id. 53, and note; *Savage v. Pleasants*, 6 Id. 424; *Craig v. United Ins. Co.*, 5 Id. 222, and note; *Richardson v. Maine Ins. Co.*, 4 Id. 92; *Teasdale v. Charleston Ins. Co.*, 3 Id. 705, and note; *Grinnold v. N. Y. Ins. Co.*, Id. 490; *Suydam v. Marine Ins. Co.*, Id. 307; *De Peau v. Russell*, 2 Id. 676; *Abbott v. Broome*, Id. 187.

LITTLE v. PEARSON.

[7 PICKERING, 301.]

ONE IN POSSESSION UNDER A CONTRACT FOR THE PURCHASE of land is not liable to pay rent on the implied contract for the use and occupation, if the owner fail to execute a conveyance.

ASSUMPSIT for the use and occupation of a tract of land belonging to plaintiff's intestate. Plea: the general issue. The defendant admitted that he had occupied the land during the term, from 1816 to 1825. It appeared that on September 18, 1817, he gave to the intestate, David Little, one hundred dollars, and at the same time received from him the following: "Newburyport, September 18, 1817. For value received I promise to pay Mr. Silas Pearson, or order, one hundred dollars, on demand, with interest. David Little. N. B.—This note is to be given up when I give him a deed of the land which I have engaged to give him. D. Little."

The deed was not made and the note was never paid, but remained in the defendant's possession, and was produced at the trial. The jury were instructed that the note and memorandum were *prima facie* evidence of payment of the one hundred dollars, but that the defendant was precluded from considering such sum as payment for the land, as he had taken a negotiable note for that amount, and that therefore the plaintiff should recover. Defendant excepted.

Verdict for the plaintiffs.

Moseley, in support of the exception, cited *Sturdy v. Arnaut*, 3 T. R. 599; *Farley v. Thompson*, 15 Mass. 18.

Marston, *contra*.

By Court, PARKER, C. J. This case, if it must be determined for the plaintiff, would produce great injustice. There was certainly no expectation between the intestate and the defendant, that the defendant should pay rent for the land which he had agreed to purchase and had paid for. Indeed, we do not see why the note, with the memorandum, is not a sufficient agreement whereby, in equity, to compel a conveyance. The interest of the money received by the intestate was just equivalent to the sum charged for rent: the intestate, therefore, received his rent in his life-time. It is true he gave his promissory note for the money he received, payable on demand and on interest, but it is manifest this was to be a mere memorandum between the parties. On the note itself it appears that it

might be discharged at any time by the delivery of the deed which had been agreed for; and though the note is negotiable in form, its negotiability to the prejudice of the intestate was destroyed by the written memorandum on it, which, though signed by the intestate alone, was binding on the defendant, he having received it in that form, and every assignee would have notice of the subsisting right to defeat the note. Under these circumstances there is no implied promise to pay rent, arising from the use and occupation, and the cases in 3 T. R. 599, and 15 Mass. 18, warrant this conclusion.

We think, therefore, the verdict should be set aside, and a new trial granted at the bar of this court.

LIABILITY OF OCCUPANT OF LAND.—In *Smith v. Stewart*, 5 Am. Dec. 186, a contract was made for the purchase of land, under which the purchaser entered into possession, but refused to complete the purchase, and it was held that the vendor could not maintain an action of assumpsit against the purchaser for use and occupation, but that the latter was a trespasser, in which character he was responsible for the *mesne profits*. In *Bancroft v. Wardwell*, and in the note thereto, 7 Am. Dec. 396, it is shown that an action for the use and occupation of land can be maintained only where the relation of landlord and tenant exists between the parties, and that it will not lie against a person who has come in under the plaintiff as a purchaser from him.

ADAMS v. PEARSON.

[7 PICKERING, 341.]

ONE IS ESTOPPED TO PLEAD A PRESCRIPTIVE RIGHT to flow land to a complainant under the statute for an increase of damage resulting from such flowing, the yearly damage having been ascertained in a prior action, and the defendant ordered to pay the same.

THE DEFENDANT IS ESTOPPED TO PLEAD that the plaintiff has sustained no damage or no increased damage since the former judgment, as that is a question for the jury.

COMPLAINT to the court of common pleas, setting forth that the complainant is the owner of certain lands; that the respondent built a mill-dam in 1812, thereby overflowing the land; that by a complaint to the same court by the same complainant against the same respondent taken in 1814, the latter was adjudged to pay the former two dollars yearly for the damage occasioned by such overflowing; that the yearly damage exceeds this sum. Pleas in bar: 1. A prescriptive right to flow the land; 2. That the flowing caused no damage; 3. A grant by the town in 1689 to respondent's grantor, and his heirs and

assigns, of all the town's right in the stream so long as a mill for the town's use should be maintained, and that the dam was built in virtue of such grant. Reply that the respondent is estopped to set up these pleas as in the former action between the same parties, by mutual consent the matters were referred to referees who reported that the respondent had no right to flow the land and should pay a certain yearly damage. To this there was a general demurrer.

Moseley, for the complainant, referred to Stat. 1795, c. 74, sec. 2; *Johnson v. Kittredge*, 17 Mass. 76.

Cushing, contra, cited Co. Lit. 352; a, 352, b; *Lowell v. Spring*, 6 Mass. 398; *Staple v. Spring*, 10 Id. 72.

By Court, WILDE, J. We think it very clear that the defendant's pleas in this case can not be sustained, and that the replication by way of estoppel is good. These pleas would have been good answers to the original complaint in 1814. But it having been settled and adjudged on that complaint, that the complainant was entitled to damages, the defendant can not now be allowed to aver anything inconsistent with that adjudication; otherwise there would be no end to controversies. Nor can the defendant plead that since the judgment in the former process the complainant has sustained no damage, or no increased damage; because the statute provides that after the yearly damages shall have been ascertained by verdict and judgment thereon, the same shall be the measure of the yearly damages until the owner or occupant of the mill, or the owner or occupant of the land flowed, shall, on a new complaint, obtain an increase or decrease of the damages. And the question whether the damages so ascertained shall be increased or decreased, can not be determined by a trial at the bar of this court, but by a jury, to be summoned by the sheriff in the manner directed by the statute. The damages in this case were ascertained by referees mutually chosen by the parties; but their report is equivalent to a verdict, and judgment thereon is as binding as a judgment on the verdict of a jury.

Replication adjudged good.

BULLARD v. BRIGGS.

[7 PICKERING, 533.]

A CONVEYANCE OF THE EQUITY OF REDEMPTION of mortgaged premises by a husband to a third person in fee for the benefit of the wife, in consideration of the release of dower to the mortgagee, which conveyance is absolute in form, and expressed to be for a money consideration, is valid as against the husband's creditors.

THE TRUE CONSIDERATION, the relinquishment of dower, may be shown by parol, and if it was equivalent in value to the equity of redemption, and the transaction was honest, the conveyance is valid.

WRIT of entry to recover an undivided moiety of a certain messuage. Issue was joined on the plea of *non disseisinit*. The tenant claimed under a deed from one Bates setting forth the consideration of one thousand five hundred dollars. The facts are recited in the opinion. Wilde, J., before whom the cause was heard, being of opinion that the conveyance to the tenant was void as against creditors, the tenant consented to be defaulted subject to the court's opinion.

Orne, for the tenant, contended that there was a sufficient consideration to support the conveyance, and cited: *Roberts on Fr. Conv.* 187, c. 3, sec. 1; 2 *Kent's Com.* 139, citing *Livingston v. Livingston*, 2 *Johns. Ch.* 537; *Id.* 145, 146; *Arundell v. Phipps*, 10 *Ves.* 139; *Brown v. Jones*, 1 *Atk.* 190; *Moor v. Rycault*, *Prec. Ch.* 22; *Ball v. Burnford*, *Id.* 113; *Scot v. Bell*, 2 *Lev.* 70; *Lavender v. Blackstone*, *Id.* 146; *Ward v. Shallet*, 2 *Ves. sen.* 17.

Morey, for the demandant, to show that the conveyance was fraudulent and void as to creditors, cited *Dolin v. Colman*, 1 *Vern.* 274; *S. C.*, 1 *Eq. Cas. Ab.* 148, 220; *Evelyn v. Templar*, 2 *Bro. C. C.* 148; 2 *Powell on Mort.*, *Rand's ed.* 674-683. No trust appears on the face of this deed, and parol evidence is inadmissible to establish a consideration different from the one expressed in the deed: *Goodwin v. Hubbard*, 15 *Mass.* 218; *Runev v. Edmands*, *Id.* 294; *Flint v. Sheldon*, 13 *Id.* 448 [7 *Am. Dec.* 162]; *Northampton Bank v. Whiting*, 12 *Mass.* 104; *Jenney v. Alden*, *Id.* 377; *Storer v. Batson*, 8 *Id.* 431; *Smith v. Lane*, 3 *Pick.* 205; *Bridgman v. Green*, 2 *Ves. sen.* 627; *Watt v. Grove*, 2 *Sch. & Lefr.* 500; *Clarkson v. Hanway*, 2 *P. Wms.* 203.

By Court, PARKER, C. J. The demandant, together with one Hobbs, purchased at a sheriff's sale the equity of redemption of the estate demanded, then under mortgage to the Commonwealth Insurance Company, it having been attached at the suit of Hobbs, on the third of September, 1824. This title must

prevail, unless the title of the mortgagor, Adna Bates, was before transferred by a legal conveyance. The tenant sets up a conveyance from Bates, purporting to have been made for a valuable consideration, on the first of September of the same year, which of course prevents the operation of the sheriff's sale, if it is valid in law. But this conveyance is disputed, on the ground that it was without any legal consideration, and so, ineffectual to pass the title against the creditors of Bates. It appearing by the testimony of the subscribing witness to this deed, that no such consideration as is expressed was paid by the tenant, she offered to show in evidence that when the mortgage was made by Bates to the insurance company, the wife of Bates, who is the daughter of the tenant, was prevailed upon to execute the deed whereby she released her right of dower in the estate mortgaged, on the engagement of her husband that the right in equity to redeem should be secured to her, and that on the same day the mortgage was executed, in consideration that she would so relinquish her right of dower. Bates then being sick and not expected to live long, being much in debt, and having little or nothing to support his wife and family in case of his death, executed the deed to the tenant of his right in the estate subject to the mortgage, with the understanding and intent that the tenant should hold the same in trust for the wife of Bates. This was done under the advice of friends and counsel, the wife having refused to relinquish her right to the dower until this arrangement was proposed and agreed to be executed. The deed to the tenant expresses no trust, nor has she yet executed any written declaration of trust, though it is stated that she is ready and willing to execute any instrument or writing which may be necessary for that purpose. The evidence of these facts was rejected by the judge at the trial; so there being no evidence of a consideration for the deed, it was held to be inoperative against creditors, and the tenant was defaulted, with liberty to move to take off the default, and to refer the question of the competency of the evidence offered to the whole court.

Several points arise out of this state of the question, which we have considered with much attention: 1. Is it competent to this tenant to avail herself of the facts proposed to be proved in order to give validity to the deed to her on which she relies for her defense? The consideration proposed to be proved is different from that which is expressed in the deed, and it is objected that the deed is conclusive upon this point; but we think it has

been reasonably settled that this matter is open to evidence. More or less than is expressed in a deed may be proved by parol evidence as the consideration, and even a different consideration, if valuable, may be proved. A deed is valid in law with any valuable consideration, however small; but as inadequateness of consideration may be relied on as evidence of fraud, the party claiming under it may show that another and a greater consideration was given than that which is expressed; and this is done to rebut the presumption of fraud, which might arise from the apparent consideration in the deed. Cases of this sort are of frequent occurrence in the investigation of conveyances alleged to be fraudulent. And it is not necessary that the consideration should pass immediately from the grantee to the grantor. If A. bargains for land with B. and pays the agreed price, and at A.'s request the deed is made to C. without any fraudulent intent, C. may maintain his title to the land by proving the consideration so paid. And even if the design of the conveyance were that C. should hold the land in trust for A., but he has executed no writing by which that trust can be legally proved, still the title of C. cannot be impeached by a creditor of B. on that account, for a declaration of trust may at any time afterwards be executed, or A. may confide in the integrity of C., and it is a matter only between A. and C. whether the trust be executed or not. In the case supposed, B. has obtained the value of his land, and his creditors are not necessarily injured. It would be for a jury, on trial, to determine whether the transaction was *bona fide*, and for sufficient consideration or a contrivance to cover the property from the creditors of B., and on this question the value of the land compared with the amount of the consideration would be an important ingredient. It is then to be considered, whether, the wife being virtually the purchaser from the husband (admitting the conveyance to be otherwise good), this relation prevents the operation of such a conveyance.

It is undoubtedly clear, that a mere voluntary settlement made by a husband upon his wife, during the marriage, he being in debt, is void against creditors; but it is equally clear that a conveyance made in trust for the wife, after marriage, upon the transfer to him, by the wife, of an equivalent out of her property, will be established, both in equity and at law; and it ought to be so, for the case supposes that whatever is taken from the funds of the husband, whereby he might satisfy his creditors, is replaced by an equal amount from the funds of the

wife, which his creditors could not otherwise reach. Post-nuptial contracts are sanctioned upon this principle, and the convenience and interest of families frequently require such exchanges. If they are honest, they ought to be supported; if feigned or pretended, they will be uncovered and defeated.

The case will depend, then, upon the nature and value of the property or interest which is parted with by the wife as the consideration of what she takes from the husband. If it be an estate, absolute and vested, there would be no question, except as to its adequacy to the estate or right acquired, and this would be settled like all other cases in which conveyances are impeached on the suggestion of covin or fraud.

The case before us presents a question not quite so clear; but yet settled, as we think, by respectable authority. The consideration for this intended settlement on the wife was her right of dower in the estate which her husband was about to mortgage. Without her relinquishment he could not raise the money wanted for his support and his debts. His days were numbered by intemperance and disease. Though she had no actual estate in the dower during the life of her husband, yet she had an interest and a right of which she could not be divested but by her consent or crime, or her dying before her husband. It was a valuable interest, which is frequently the subject of contract and bargain; it was an interest which the law recognizes as the subject of conveyance by fine in England, and by deed with us. It is more or less valuable, according to the relative ages, constitutions, and habits of the husband and wife. It is more than a possibility, and may well be denominated a contingent interest. Now, if we find that the surrender or conveyance by the wife of a contingent interest in property is a sufficient consideration for the settlement of property by the husband upon her, then it is clear that the default in this case should be taken off, and that the parties should go to trial upon the general merits of this settlement. And we think, although there are authorities for both sides of the proposition, the weight of them is clearly with the affirmative. The strongest case cited by the demandant's counsel, indeed the only one directly to the point, is that of *Dolin v. Colman*, 1 Vern. 294, in which a conveyance to the wife, of the whole equity of redemption in land which the husband had mortgaged, and in which she had relinquished her right of dower, was set aside in favor of two subsequent mortgagees of the husband. They, however, were subsequent purchasers, not creditors, and a dis-

inction exists in favor of purchasers, by stat. 27 Eliz., which does not hold in favor of creditors under the thirteenth of the same queen; for there must be fraud in the latter case to avoid the conveyance.

A late writer on marriage settlements, Atherley (p. 162), who appears to have thoroughly considered the subject, and has reviewed all the authorities, says: "This case is but shortly reported, and the reasons for the decision do not very clearly appear. The reason, most probably, was that the settlement was more than a reasonable equivalent for the interest the wife had parted with; and if so, the case of *Dolin v. Collman* in no wise affects the position that parting with a right of dower will support a settlement after marriage." This writer also supports the position taken in this opinion, that the consideration need not be expressed in the deed; for, he says, if the settlement, on the face of it, appears to be purely voluntary, no notice being taken of the wife having released her jointure, etc.; yet, if the fact of her having done so can be shown to have taken place about the same time that the settlement was made, the court will presume the settlement to have been made for that consideration: *Id.* 164. The authority principally relied on in support of his conclusion, is *Ward v. Shallet*, 2 Ves. sen. 16, which case fully justifies the position. The wife, holding a bond from the husband, upon which judgment was not entered up, so that she had no lien on his estate, and the bond being payable only in case of her surviving, as is to be supposed, for it is called a contingent interest, gave up the bond and took an annuity from the husband out of his estate. This was held good against creditors, and the chancellor said there was no distinction, in this respect, between contingent and vested interests.

In the case of *Scot v. Bell*, 2 Lev. 70, it was decided that a jointured wife may, by renouncing her present provision, become a purchaser for a valuable consideration from her husband of an ample provision for herself. This was a case at law, as was also the case of *Lavender v. Blackstone*, 2 Lev. 146. Indeed, there seems to be no distinction in principle between a relinquishment of a jointure and a dower, both being contingent upon the surviving of the wife, and equally certain as to the accruing of the estate in case of such surviving. Roberts, in his treatise on fraudulent conveyances, seems to think it not settled that if a married woman suffers a fine to bar herself of dower, such act will be a good consideration for a settlement by the husband, though the intimations of the court in the case of

Lavender v. Blackstone, are strong to that effect. The words of the court are: "That as the wife did not join in the fine which was levied by the husband, of his estate tail, she continued dowable, but if she had joined, it might have made the settlement to be upon good consideration, which otherwise was merely voluntary." And Roberts concludes his examination of the cases by the remark: "It seems reasonable to presume that if the wife, in the case of *Scot v. Bell*, had joined in the fine for the purpose only of barring her dower, instead of parting with her jointure interest in the manor of Blackacre; and in consideration of her joining for such purpose, the husband had limited a life estate to her in his lands at Whiteacre, such estate would have been good and supportable against creditors or subsequent purchasers for valuable considerations." Chancellor Kent, in his valuable commentaries, vol. 2, p. 139, 145 (third ed. 173, *et seq.*), cites these authorities, and advances the position that post-nuptial contracts founded on the transfer by the wife of a contingent interest only, are valid against creditors.

We think, then, there is ample authority for adopting the principle, that a relinquishment of dower by the wife, living the husband, is a good and valuable consideration for a conveyance by the husband to the wife of property which may be considered but a fair equivalent, and that such a conveyance will be valid or otherwise, according as it shall appear on the trial that it was fair or fraudulent, like conveyances by the husband to other persons; on which trial the comparative value of the estate granted and of the consideration will be taken into view. The writer before cited (Atherley) observes on this part of the subject, that even if the authorities had not so well settled the point, there could be no reason for holding that a settlement was bad, merely because it arose out of an arrangement between husband and wife; for in inquiring into the validity of post-nuptial settlements, the true and only point of inquiry is, whether the settler has received a fair and reasonable consideration for the thing settled, so as to repel the presumption of fraud. That the wife takes a fee, instead of a life estate, is of no importance, excepting in ascertaining the comparative value, with a view to the honesty of the transaction. We find that it is equally well settled, that a consideration of this nature passing from the wife to the husband is sufficient to support a settlement upon the children; and this may as well be done by giving the wife an inheritable estate as by a direct settlement upon them. We are quite satisfied with the justice of this prin-

ciple of law, and are glad to find it rests on authority as well as reason; for under the restrictions mentioned, creditors can not be injured; the husband's estate, to which they may look, not having been impaired substantially by such arrangements. Whenever it shall appear that such settlements are but pretexts to secure a beneficial property to the husband, or wife, or children, the law will lay bare the transaction, and defeat the contrivance, however ingeniously it may have been devised.

WHITTAKER v. SUMNER.

[7 PICKERING, 551.]

WHERE A SUBSEQUENT ATTACHING CREDITOR ACTS AS AUCTIONEER at the sale of the premises levied upon under a prior execution, and does not disclose that he has levied on the same premises, and the officer's return stated that he had advertised the place of sale, which was not true, the attaching creditor having obtained judgment, may maintain an action against the sheriff for a false return and recover the amount of his judgment and interest, that being less than the sum realized on the execution sale.

THE AUCTIONEER AT AN EXECUTION SALE is not bound to disclose his interest in the premises under his attachment.

AN OFFICER'S RETURN IS CONCLUSIVE on all questions that can arise between the creditor and debtor, and all persons claiming under either of them.

CASE against the defendant, a sheriff, for a false return made by one of his deputies on executions in favor of Ralph Huntington and A. Dolliver against Benjamin Huntington, whereby the plaintiff was injured, he having attachment, judgment, and execution against the same B. Huntington, which, it was alleged, would have been satisfied but for the plaintiff's false return. It appeared that the plaintiff's attachment was subsequent to the attachments of Dolliver and B. Huntington; that the interest in lands of B. Huntington that was attached was an equity of redemption in certain lands; that at the execution sales under the judgments obtained by Dolliver and B. Huntington, the equity was sold for a fair price and for more than was sufficient to pay the judgment subsequently obtained by the plaintiff; that the proceedings under the execution sale were regular, except that the officer's return stated that he had duly advertised the time and place of sale, when from the advertisement it appeared that the place of sale had not been mentioned; that the plaintiff, supposing the sales to be void by reason of this irregularity, levied his execution on the equities, but could find no purchaser, the proceedings under the former executions being

stated. It appeared that the plaintiff himself was the auctioneer at the former sales, and that he did not mention that he had any attachment upon them, or that they were subject to any incumbrance other than the respective mortgages. Nothing was said at the sales of any defect in the advertisements.

A nonsuit was ordered, subject to the opinion of the court.

Hubbard and Cooke, for the plaintiff. The stat. 1798, c. 77, sec. 4, makes it essential that the officer should advertise the place of sale. He should have obeyed the statute: *Rex v. Cooke*, 1 Cowp. 30; *Williams v. Amory*, 14 Mass. 29, 30; *Wellman v. Lawrence*, 15 Id. 326; *Taylor v. Fenwick*, 3 Bos. & P. 553, note. The return is false: *Frothingham v. Marsh*, 1 Mass. 247; *Davis v. Maynard*, 9 Id. 242; *Wellington v. Gale*, 13 Id. 488, 489, and the remedy here sought is the proper one: *Slayton v. Chester*, 4 Mass. 478; *Bott v. Burnell*, 9 Id. 96; S. C. 11 Id. 163; *Bean v. Parker*, 17 Id. 591; *Livermore v. Bagley*, 3 Id. 513; *Wright v. Hooker*, 4 Cowen, 415.

Rand and Morey, contra. The plaintiff having acted as auctioneer at the sale, and having represented that the estate was subject to no other incumbrance than the mortgages, is estopped from setting up the lien of his own attachment, which he concealed, and from contesting the validity of proceedings which he sanctioned: 2 Stark. Ev. 28-54; *Like v. Howe*, 6 Esp. 20; *Clarke v. Clarke*, Id. 61; *Malby v. Christie*, 1 Esp. 340; *Lundie v. Robertson*, 7 East, 236; *Taylor v. Jones*, 2 Campb. 105; *Gibbon v. Coggon*, Id. 188; 1 Pow. on Mort. c. 13, p. 434-446; *Burrowes v. Lock*, 10 Ves. 473.

By Court, PUTNAM, J. We shall consider, in the first place, whether the officer made a false return. He stated that he had duly advertised the time and place of the sale; and upon reference to the advertisement, it appears that the place of the sale was not specially designated. The statute 1798, c. 77, sec. 4 (Rev. Stat., c. 73, sec. 39), touching the manner of selling rights in equity of redeeming real estate mortgaged, provides that the officer "shall give notice in writing of the time and place of sale to the debtor," and public notice "of the said time and place of sale by posting up notifications thereof," and he "shall cause an advertisement of the time and place of sale to be published in some public newspaper;" and that if the estate "shall not be disposed of at the time and place appointed," the officer may adjourn the vendue. The place of sale is mentioned, in connection with the time of sale, four times in this

section; and it is most manifest that the legislature intended that the officer should strictly comply with the requisitions touching the one as well as the other. "Everything essential to a title under the statute ought to appear of record:" *Wellington v. Gale*, 13 Mass. 488, and is not to be collected by inference, from extraneous facts.

It has been contended, however, that this return may be supported on the authority of *Colman v. Anderson*, 10 Mass. 115, which was a sale for taxes thirty years before the trial, and an objection to its legality was made, because the officer did not give notice of the hour of the day on which the sale was made, but only of the day, which notice was held to be good. But it is to be observed that if a person desirous of attending a sale had attended at the place of sale the whole day, he might have accomplished his object, and that, too, without making any other inquiry for information than was given in the advertisement. But a person desirous of attending the sale now under consideration, could not ascertain where the sale was to be made, without inquiring beyond the advertisement. We are all clearly of opinion that the officer made a false return, in returning that he had given notice of the place where the sale would be made.

We are next to consider what effects followed from this return. It is conclusive in all questions that can arise between the creditor and debtor, and all persons claiming under either of them: see the cases collected in Big. Dig., Officer, G, pl. 6. So that if the plaintiff had extended his execution upon the same right in equity of the judgment debtor, he could not have controverted the facts stated in the return. He was not, therefore, as had been argued, required to go on and levy and try the title, which would have resulted in certain loss, but is entitled to recover the damage he has sustained by reason of the misconduct of the officer. If the officer had returned the fact as it existed, referring to the advertisement for particular information, so as to make it a part of his return, the plaintiff might have obtained a satisfaction of his execution by a levy subsequent to that which the officer had made for Ralph Huntington. As the circumstances existed, the remedy which the plaintiff has pursued seems to us to be the proper one.

But it has been contended that the plaintiff is estopped by his own representations at the auction sale to claim any advantage from his attachment. The case cited from 1 Esp. 340, *Malby, assignee of Durouvieray, a bankrupt, v. Christie*, is as

strong as any to support this point, but not sufficient. The plaintiff was required to prove the bankruptcy of Durouvery, and offered the defendant's catalogue of the sale of his property, stating him to be a bankrupt. The defendant was acting in his own name and behalf, and admitted under his own hand the fact in controversy. The dictum of Lord Eldon, recognized by Sir William Grant, in the note to 1 Pow. on Mort. 445, is true, as a general remark: That if a representation be made to another person going to deal in any matter of interest upon the faith of that representation, the former shall make it good if he knows it to be false. If the plaintiff had undertaken for himself personally to stipulate that the officer had proceeded legally in regard to the levying of the execution, and it had turned out otherwise, he would without doubt be concluded. But in the case at bar the plaintiff acted in his public capacity of auctioneer, and not on his own account. The plaintiff had a right to keep his own secret touching his attachment; so far, at least, is certain, that he was not bound to surrender it merely because he was called upon to perform a duty in his official character. What he did and said at this sheriff's auction, was to be taken by all concerned as if the officer for whom he was acting had done and said the same things. No deception was practiced, no personal representation was made. The sale was conducted in every respect as if it had been in fact made by the officer, without the intervention of a public auctioneer.

Neither the cases cited nor the reason of the thing has convinced us that he was called upon to disclose his own private concerns, any more than he would have been if he had attended the sale in case it had been conducted by the officer himself or by any other public auctioneer. Besides, the question is not as to the validity of the first sale, which is established by the return, as has been already shown. If, therefore, the sheriff and the plaintiff would be estopped to disturb the sale, it does not follow that the plaintiff is estopped from showing the defendant's false return, which is the foundation of this action, and which was the act of the defendant, the plaintiff having had no participation in it. If, therefore, the vendee at the first sale could have estopped the plaintiff had the sheriff made a true return, it would be no bar in this action, and could only affect the damages. The result is that the judgment creditor, for whom the officer was acting, would have lost his lien upon the property if the officer had returned the truth. By means of the false return the property was secured to his principal, but the

effect of that has been to deprive the plaintiff of his legal right to levy upon it. It being admitted to have been sufficient to satisfy the plaintiff's execution, that must be considered as the measure of damages, with interest from the service of the writ. The opinion of the court having been formed upon the grounds before stated, it is not necessary to consider any other of the points which were made in the argument.

The judgment of the court is, that the nonsuit shall be taken off, and a new trial shall be granted.

ON THE NEW TRIAL OF THIS CAUSE, the defendant raised the further objection that the plaintiff had no attachment of the estates in question by virtue of the return upon his writ, the return being as follows: "I attach all the right, title, and interest in and to a certain piece or parcel of land, with the buildings thereon, situate in Columbia street, at the southerly part of Boston, and one piece of land, and the buildings thereon standing, being situate in Pleasant street in said Boston, which the within-named Benjamin Huntington has to the estates before mentioned." The chief justice instructed the jury that, as it had been proved that Huntington had no real estate in Pleasant and Columbia streets except the two estates in question, the return on the plaintiff's writ contained a sufficient attachment of those two estates for the purposes of this case. The jury were further instructed that, as the plaintiff would have received the whole of his debt had it not been for the false return, they should give a verdict, if they found for the plaintiff, for the full amount of his claim. The verdict being for the plaintiff for the whole of his demand, the defendant moved for a new trial on the ground of misdirection to the jury. The opinion of the supreme court was as follows:

"The return of the attachment on the plaintiff's writ against Huntington has as much certainty as returns in general of attachments on meane process. Whether the description of the land should be as certain as in the case of a deed may be doubted; but if it should be, we are not clear that this return would be insufficient. Huntington had only one house in each street, so that the property attached would be readily ascertained. *Id certum est*, etc. It is said, however, that parol evidence to ascertain the land is inadmissible. But even where the description is free from any objection of uncertainty, as where the owners of the adjoining land are named, it is necessary to have recourse to parol evidence to determine the bounds. If Huntington had been the owner of two estates in the same street, parol evidence could not have been received to show which of the two was intended to be attached. In regard to damages, we have been referred to the case of *Rich v. Bell*, 16 Mass. 294, where personal property of a debtor having been attached on several writs, the officer, by direction of all the attaching creditors except the last one, sold the property and applied the proceeds to the judgments afterwards recovered, according to the priority of the attachments; whereupon the dissenting creditor sued the officer; and the court held that he was entitled to nominal damages only, because, if the property had been kept by the officer and been sold upon execution, the proceeds would have been insufficient to satisfy the judgments of the other creditors. There, if the fault of the officer, which was the ground of complaint, had not been committed, the dissenting creditor would have derived no benefit from his attachment. This

case is different. Here the complaint is that the officer made a false return; whereas, if he had returned the truth, this creditor of Huntington would have come in and obtained satisfaction of his demand. He is entitled to judgment for the amount of the debt, and interest and costs."

Judgment according to verdict.

HOLLY v. HUGGEFORD.

[8 PICKERING, 73.]

TRESPASS BY THE OWNER OF GOODS CONSIGNED to a factor who has a lien thereon for a balance due him from the owner, will lie against the officer who attaches the goods as the property of the factor.

THE LIEN OF A FACTOR IS A PERSONAL PRIVILEGE, and can not be set up by a third person as a defense to an action by the principal.

WHERE A FACTOR SELLS PERSONALTY of his principal, and subsequently takes it back at a reduced figure on account of a defect, and charges the same to his principal, the latter has sufficient property therein to maintain trespass against one who takes it from the factor's possession.

ONE WHOSE PROPERTY IS WRONGFULLY ATTACHED in a suit against another, may sell his property while under attachment, and the vendee may bring trespass in the name of the vendor against the attaching officer.

TRESPASS for taking certain chain cables. Plea, the general issue, and that the defendant, as sheriff, had attached the cables as the property of Lobdell, at the suit of Levi Haskell, October 17, 1826. The cables were consigned by the plaintiff to Lobdell as a commission merchant, in the years 1825, 1826, to be sold. Lobdell used some of the cables, without Holly's knowledge or assent, in raising a vessel, intending to restore them in good order, and they were attached while in use for this purpose. In August, 1826, Lobdell stopped payment, and then made an account, in which he charged the plaintiff with several acceptances, thereby making a balance in his favor. Some of these acceptances were never paid. It also appeared that Lobdell had sold the largest chain mentioned in the declaration, to Cutler & Hammond, and afterwards repurchased it on his own account at a reduced figure; that this chain proving defective, Lobdell charged it to Holly as bad, and the latter assented to this, as he had given Lobdell instructions to receive back any chains that should prove defective. In 1827, Holly sold all his interest in the chains to Hinton and Moore, with authority to use all lawful means in Holly's name to obtain the same.

Verdict for the plaintiff for the value of the chains. Motion for new trial for misdirection of the jury.

H. H. Fuller, for the defendant. At the time of the attachment plaintiff had neither the actual nor constructive possession, it having been prevented by Lobdell's lien. Trespass, therefore, will not lie: 1 Chit. Pl. 166, 167; Com. Dig., Trespass, B. 4; *Smith v. Miller*, 1 T. R. 480; *Ward v. Macauley*, 4 Id. 489; *Gordon v. Harper*, 7 Id. 9; 3 Stark. Ev. 1438, 1439; *Walcot v. Pomeroy*, 2 Pick. 121; *Putnam v. Wyley*, 8 Johns. 337 [5 Am. Dec. 346]; *Van Brunt v. Schenck*, 11 Id. 377. Holly, having assigned to Hinton and Moore, can not maintain this action: Long on Sales, 162, 165, 166, 170; *Haskell v. Greely*, 3 Greenl. 425; *Zwinger v. Samuda*, 7 Taunt. 265; *Harman v. Anderson*, 2 Campb. 243; *Portland Bank v. Stacey*, 4 Mass. 661 [3 Am. Dec. 253]; *Jewett v. Warren*, 12 Id. 300 [7 Am. Dec. 74]; *Putnam v. Dutch*, 8 Id. 288.

Shaw and Bartlett, contra, contended that trespass was the proper form of action, and cited *Walcot v. Pomeroy*, 2 Pick. 121; *Brownell v. Manchester*, 1 Id. 234; *Stevens v. Briggs*, 5 Pick. 177; *Gordon v. Harper*, 7 Id. 9. The defendant can not set up Lobdell's lien, even if he had any: *Meeker v. Wilson*, 1 Gallison, 425; *Jones v. Sinclair*, 2 N. H. 319.

By Court, PARKER, C. J. The principal objection to the verdict in this case arises from the supposed lien which Lobdell, the debtor, had on the goods attached, as the factor to whom they were sent to be sold on commission, he having accepted drafts drawn by Holly, the plaintiff, the balance at the time of the attachment being in his favor.

It was argued that this lien so destroyed the right of possession in Holly, that he can not maintain trespass against the sheriff who made the attachment. We think this objection is not supported. It is true that the plaintiff must be in possession of the goods at the time of the injury, in order to maintain this action, for it is a remedy for an injury done to the possession. But by the authorities, general property in the goods carries with it constructively the possession, unless by some act of the owner he has so parted with the possession that at the time of the injury he has no right to reclaim it; as if, by contract, he had given the use and possession of the goods for a specified time during which that injury occurs; which may happen in the case of a lease of a house with the furniture in it, or of a store with the goods in it, or of a manufactory with the machinery. But the lien of a factor does not dispossess the owner until the right is exerted by the factor. It is a priv-

ilege which he may avail himself of, or not, as he pleases. It continues only while the factor himself has the possession, and therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass, if they are forcibly taken; for his constructive possession continued notwithstanding the lien. None but the factor himself can set up this privilege against the owner. It is a personal privilege of the factor, and can not be transferred, nor can the question upon it arise between any but the principal and factor: *Jones v. Sinclair*, 2 N. H. 321; *Daubigny v. Duval*, 5 T. R. 606.

The next objection is that the property in the large chain having vested in Lobdell by his purchase from Cutler & Hammond, to whom it had been sold by him, could not be divested but by some formal act of transfer from him to Holly, of which, it is said, there was no evidence. But we think on this point the case is clearly made out for the plaintiff. By the original authority given to Lobdell to sell, it was agreed that in case the cables should prove defective, they should be returned. Now, the large cable proved to be defective. The plaintiff was notified of it, and agreed to take it back, and it was on Lobdell's books charged back to Holly before the attachment. This was quite sufficient to re-vest the property in Holly, and Lobdell being his agent and factor, there was no need of a formal act of delivery, for the possession of the factor is the possession of the principal.

The last objection is founded on the assignment of his interest in this property by Holly after the attachment, but before this action was commenced; from which it is inferred by the counsel for the defendant that Holly had no property remaining, and, therefore, has no right to recover. The property at the time of that assignment was in the custody of the law under attachment. The plaintiff's right was in action only, and that he could not sell, so as to enable the vendee to sustain an action. He had a right to carry on the suit in his own name for the benefit of his vendee, and the defendant can not object to his want of title on this ground.

Judgment according to verdict.

POSSESSION TO MAINTAIN TRESPASS.—See the note to *Orser v. Storms*, 18 Am. Dec. 543. Officer levying on stranger's property is a trespasser. See *Jamison v. Hendricks*, Id. 131, and note to *Owings v. Frier*, 12 Id. 394.

SARGENT v. THE FRANKLIN INSURANCE COMPANY.

[8 PICKERING, 90.]

SHARES IN THE CAPITAL STOCK of an insurance company are personal property of assignable character, and any by-law of the company limiting their transfer only at the office of the company, personally, or by attorney, with the assent of the president, would be in restraint of trade, and contrary to the general law of the commonwealth.

A PURCHASER OF SHARES OF STOCK IS ENTITLED TO A CERTIFICATE on the production of evidence of the assignment to the officers of the company and making demand herefor.

AN INSURANCE COMPANY CAN NOT REFUSE TO TRANSFER stock on its books on the ground that the assignor is indebted to the company.

DIVIDENDS DUE when notice of the assignment was received, may be retained as security for the indebtedness of the assignor to the company.

AN INSURANCE COMPANY REFUSING TO TRANSFER STOCK on its books, and attaching the same as property of the former holder, is liable to the assignee in damages measured by the value of the shares at the time of the refusal, with interest.

ASSUMPSIT to recover damages for refusing to transfer to the plaintiffs, copartners, on the books of the company, and deliver to them a certificate of twenty-five shares of stock standing in the name of Adams & Amory, and alleged to have been assigned to the plaintiffs. Adams & Amory had held a certificate of these shares, dated February 10, 1824, and executed an instrument of assignment of the same May 24, 1826. On the next day, May 25, 1826, Brooks, one of the plaintiffs, called during business hours, before twelve m. at the office of the company, and the president being absent, showed to the secretary the assignment with the power of attorney to the assignees, empowering them to make a transfer of the shares on the books of the company, and demanded certificates to be issued in the names of the assignees, offering to surrender the certificates of Adams & Amory. The secretary read the different instruments, but declined to act in the matter, saying it was the president's business. On the same day at twelve o'clock the defendants caused the shares to be attached at its own suit against Adams & Amory, and under this attachment, judgment, and execution, the premises were sold and the proceeds paid to the company in satisfaction of Adams & Amory's debt.

The by-laws of the company make it a duty of the president "to attend at the company's office during the hours of business." Certificates of stock are required to be authenticated by the president, and it is made his duty "to attest all certificates and transfers of stock." The certificates bore on their face that

they were "transferable only at the office of said company by [the holders] or their attorney." The first count of the declaration asked damages for the refusal to make the transfer, and the second, that the dividends that had accrued be paid to the plaintiffs.

The cause was submitted for the court's opinion.

Aylwin, for the plaintiffs. Shares in an incorporated company are assignable by delivery of the certificates, or other evidence of property: *Prescott v. Hull*, 17 Johns. 284, 292; *Jones v. Witter*, 13 Mass. 307; *Briggs v. Dorr*, 19 Johns. 95. The plaintiff's title was complete on the assignment and delivery of the certificates: *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238; *Quiner v. Marblehead Soc. Ins. Co.*, 10 Mass. 476; *Kane v. Bloodgood*, 7 Johns. Ch. 132 [11 Am. Dec. 417.] The demand for the transfer made by one of the partners was sufficient: *Ball v. Dunsterville*, 4 T. R. 313; *Ludlow v. Simond*, 2 Cai. Cas. 1, 42 [2 Am. Dec. 291]; *Mackay v. Bloodgood*, 9 Johns. 285. The company's attachment cannot prevail over the transfer to the plaintiffs, it being known to the company: *Anderson v. Van Alen*, 12 Johns. 343; *Dix v. Cobb*, 4 Mass. 508. The plaintiffs are entitled to damages measured by the value of the shares at the time the damages are assessed, together with all dividends accruing since the assignment: *Shepherd v. Johnson*, 2 East, 211; *Forest v. Elwes*, 4 Ves. 497; *McArthur v. Seaforth*, 2 Taunt. 265. In regard to this form of action, it is the settled rule that all duties imposed by law on corporations raise implied promises, for the performance of which an action may well lie: *Bank of Columbia v. Patterson's Admr.* 7 Cranch, 306; *Rex v. Bank of England*, 2 Doug. 524; *Hayden v. Middlesex T. Corp.*, 10 Mass. 400 [6 Am. Dec. 143]; *Danforth v. Schoharie T. Corp.*, 12 Johns. 227; *Overseers of N. Whitehall v. Overseers of S. Whitehall*, 3 Serg. & R. 117.

J. T. Austin, contra.

By Court, PUTNAM, J. We think it can not be maintained that the right to the shares in the capital stock of this corporation can not be transferred without a literal compliance with the by-laws. It is personal property: 3 Dane's Abr. 108; 5 Id. 157. It might be conveyed by will; it might descend from an intestate to his heir. It may be assigned without deed, by a delivery of the certificate with an indorsement upon it for a valuable consideration: *Quiner v. Marblehead Ins. Co.*, 10 Mass. 476. And in such cases the legatee, heir, or assignee would be en-

titled to have the transfer made in the books, and to a certificate of his property. A by-law which limits the transfer of the stock to be made only at the office personally or by attorney, and with the assent of the president, would be in restraint of trade, and contrary to the general law of the commonwealth, which permits the right to personal property and incorporeal hereditaments to be transferred in various other ways. The purchaser or other person entitled should make his right known to the corporation, that it may be entered upon their books, to the end that they may have proper evidence to whom the dividends or profits should be paid.

The objection in the case at bar is not so strong as that which was made in *Quiner v. Marblehead Ins. Co.*, above cited. By the act of incorporation of that company, it was provided that no transfer should be permitted to be valid until all the installments were paid in. That was construed not to extend to a transfer by a debtor to a creditor, but as only intended to prevent speculation in the scrip before all the installments were paid. And it was held that the original subscriber might lawfully transfer his right in the shares in payment of a debt, when only part of the installments had been paid, and that the assignee would be entitled to a certificate of property upon payment of the residue.

It is, however, contended, "that no legal demand was made to change the legal title of the shares." All that could be required of the person demanding a transfer on the books, would be to prove to the corporation his right to the property. In this case, one of the joint assignees produced the assignment, with the original certificate of the former owners, and claimed for himself and his partner to be the purchasers for a valuable consideration. We think that was a sufficient notice of the assignment and request to have the transfer made upon the books of the corporation. We have considered the case upon the validity of the assignment alone, and just as if there had not been a joint power to the plaintiffs from the assignors. And we are satisfied that the assignment alone gave to the plaintiffs a right to the property, and by the operation of the law one partner might make a legal demand for both. In *Lamb v. Durant*, 12 Mass. 57 [7 Am. Dec. 31], the chief justice well observed that "there seems scarcely an act contemplated to be done by merchants, which one copartner, acting for both, can not do as effectually, to bind the whole copartnership, as if each member had acted."

This assignment would clearly be good as between the parties to it. Adams & Amory had granted all their right to the plaintiffs, and the defendants had notice of it before they attempted to obtain the property for themselves by legal process. We have said that the defendants had notice, because we are satisfied that the notice to the secretary was sufficient notice to the corporation. It is no answer that the president of the corporation was not at his post in the hours of business when the demand of the transfer was made. He should have been there, and the corporation is not entitled to use his neglect of duty in their defense. There can not be any room to doubt, from the evidence in the case, that he might have given authenticity to the transfer, if he and the corporation had pleased, before they attached the shares for themselves. If that had been done, the plaintiffs would have had legal evidence added to their equitable right of property. Upon the production of that evidence and request, it became the duty of the corporation to transfer the shares to the plaintiffs; and the corporation is bound to compensate them for the injury they have sustained.

The law supposes that the corporation promises or undertakes to do its duty, and subjects it to answer in a proper action for its defaults, whether of non-feasance or misfeasance: 3 Dane, 109; 5 Id. 160; *Bank of Columbia v. Patterson*, 7 Cranch, 299. In pp. 305, 306, Mr. Justice Story, in an able, learned, and concise statement of the powers, duties, and liabilities of corporations, observed, that "all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie." The principle had been recognized in this state in the cases cited by Story, J., and by the learned author of the *Abridgment of American Law*.

The suggestion in regard to the action, viz., that it should be in the name of the assignors, can not be sustained. We think that the holders of these shares had a right to transfer them, so that the assignees would have a right of action in their own names for any injury they might sustain touching this property. The chief justice, in *Howe v. Starkweather*, 17 Mass. 243, considered shares in incorporated companies not to be chattels, but to have more resemblance to choses in action, being merely evidence of property; but he said also: "If, under an irregular sale, certificates of the shares were given to the purchaser, the case would be more analogous to the sale of a chattel; for the delivery of the certificate would be like the

delivery of the chattel, and the transfer might be considered complete." In the case at bar, the certificates of the shares were delivered to the plaintiffs, together with the assignment; so these shares, according to the case cited, would be more like chattels than choses in action.

It is contended that the title was not complete in the plaintiffs before the attachment which was made by the defendants, and that it was just as necessary that the transfer upon the books should be made with the assent of the president as that a chattel should be delivered to change the property. But the defendants are not in a situation to raise this objection. An attaching creditor, without notice, would prevail against a vendee who had not perfected his title: *Lanfear v. Sumner*, 17 Mass. 112 [9 Am. Dec. 119]. But the defendants had notice of the transfer, and were required to give legal authenticity to it before they made their attachment. By their legal process, therefore, they can not defeat the right which the plaintiffs had acquired by the assignment.

It is further contended, that Adams and Amory were indebted to the defendants, and therefore they were not obliged to admit a transfer of the shares until their debt was paid. We do not know on what ground that argument can rest better than that which is suggested, that the assent of the president is to be required to prevent transfers which are injurious to the corporation, and that a power of assenting implies a power of refusing. No authority is cited in support of that position. In *Bates v. New York Ins. Co.*, 8 Johns. Cas. 238, a similar claim was rejected. The company had refused to transfer unless the assignee would pay the debts due from the assignor, and the assignee who paid under those circumstances was permitted to recover back the money on the ground that the corporation had no right to require such a payment. A different rule, and, as it seems to us, a reasonable one, was adopted in regard to the dividends which were due when the corporation had notice of the assignment. The money then being in the hands of the company, was considered as appropriated towards a debt which was then actually due. But the company were held obliged to make the transfer on the day when the last installment was paid, and the assignee was to have the dividends thereafter to be made.

It does not appear from the report in the case at bar, that there were any dividends in the defendants' hands at the time when the plaintiffs demanded the transfer, but we are of opin-

ion that whatever money they then had on hand should be considered as pledged towards any just debt which was then due from the assignors. Any surplus money then on hand would pass with the shares, in virtue of the assignment, and is to be added to the value of the shares. But the defendants have taken the shares on their execution, and so appropriated the same to their own use.

The only remaining consideration is, by what rule the damages shall be assessed. For the defendants it is contended, on the authority of *Gray v. Portland Bank*, 3 Mass. 364 [3 Am. Dec. 156], that the value of the shares at the time of the demand and refusal to transfer them should be the measure of damage. It has been contended for the plaintiffs, that as the defendants have taken the shares for which the plaintiffs had paid, they should be held to pay as much, at the least, as they would be liable to pay for not transferring stock which had been loaned, or stock which had been paid for in advance, according to the rule adopted in New York, and stated in *Clark v. Pinney*, 7 Cowen, 681, and the cases there cited. Speaking for myself only, I should have been inclined to adopt that rule, which would have charged the defendants with any advance upon the value between the time of the demand and the trial. But all my brethren prefer the other rule, and on the ground that the defendants should not be held to pay more for this property than for goods which they had wrongfully converted to their own use. We decided in *Kennedy v. Whitwell*, 4 Pick. 466, that in trover for goods the rule of damages in this commonwealth is the value at the time of the conversion, notwithstanding the goods had been sold at an advanced price before the trial. And it is to be observed that the certainty and uniformity of a rule may be of more public utility than one which is fluctuating, which may sometimes do more exact justice in a particular case.

The court is of opinion, therefore, that the value of the shares at the time of the demand and refusal to transfer, is to be the measure of the damage. Interest will be added from the time of the demand, on the amount found to be then due, in lieu of any dividends which may have been subsequently declared.

BAKER v. BRIGGS.

[8 PROMCKING, 122.]

A VERDICT WILL NOT BE SET ASIDE as against evidence, where there is evidence on both sides, unless where it is manifest that the jury have mistaken or abused their trust.

THE DECLARATIONS OF ONE WHO IS A COMPETENT WITNESS are not admissible to charge another.

A SURETY HAS THE SAME DEFENSES AT LAW, in Massachusetts, when sued alone, as he would have in equity.

A CREDITOR HOLDING PROPERTY OF THE PRINCIPAL DEBTOR as security for his demand, will lose his remedy against the surety to the value of the property, should the same be released without the surety's consent.

IF THE SURETY IS TOLD BY THE CREDITOR that the debt is paid, and thereby loses an opportunity of securing himself, he is discharged, although the debt was not paid and the creditor acted under a mistake.

WHERE A CREDITOR RECEIVED THE NOTE OF A THIRD PERSON from the principal debtor, and gave a receipt that it was received "in security for all notes signed by" the debtor, in an action against the surety, parol evidence was admitted to show that the note was received in payment, with intent to discharge the debtor and his surety.

ONE WHO WRITES HIS NAME ON THE BACK OF A NOTE, at the time it was made, may be declared against as an original promisor.

ASSUMPSIT to recover the amount of a promissory note. One of the accounts was against the defendant, as maker. The note was as follows: "Boston, August 1, 1825. For value received, I promise to pay Horace Baker, or order, the sum of one hundred and sixty dollars, in six months from date, with interest. Isaac Ryan." On the back was the name "Otis Briggs." The signatures of Ryan and Briggs were admitted. The defendant called witnesses, one of whom testified that the plaintiff had told him that he, plaintiff, had obtained his pay of Ryan, and that Briggs was clear; that he had purchased from Ryan a note of one Thayer, at six per cent. discount. Another witness for the defendant gave testimony, from which it appeared that Baker had received a horse and gig from Ryan as security for the debt, but had parted with the same on getting the Thayer note, thinking that he could get his pay from that.

The plaintiff offered Ryan as a witness, who testified that he had indorsed the Thayer note of five hundred dollars to Baker, taking a receipt from him, which expressed the true bargain between them regarding the note; that he had lost the receipt, but one Richardson had taken an exact copy. Richardson was called, and testified that he had taken an exact copy of the receipt. A paper was handed, containing the following, which witness said was the copy he had taken:

"Boston, May 29, 1826. This is to certify that Horace Baker holds a note of five hundred dollars, signed by Libbeus Thayer, of Randolph, in security for all notes signed by Isaac Ryan, of West Bridgewater.
HORACE BAKER."

There was other testimony, unimportant except as regards the question of the verdict's being against the evidence.

The instructions of the court, excepted to by the plaintiff, appear from the opinion. Verdict for the defendant. Motion for a new trial, for misinstruction of the jury, and because the verdict was against evidence.

Morey, for the plaintiff. Briggs was an original promisor: *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68] *Carver v. Warren*, Id. 545; *Hemmenway v. Stone*, 7 Id. 58 [5 Am. Dec. 27]. It must appear from the instrument that Briggs was surety to entitle him to the privileges of one as against Baker: *Hunt v. United States*, 1 Gallison, 83; *Townsend v. Riddle*, 2 N. H. 448. Ryan's declarations were admissible against the defendant: *Frye v. Barker*, 4 Pick. 382; *Hunt v. Bridgham*, 2 Id. 581 [13 Am. Dec. 458]; *Howard v. Cobb*, 3 Day, 309; *Wood v. Braddick*, 1 Taunt. 104; *Martin v. Root*, 17 Mass. 227; *Grant v. Jackson*, Peake's Cas. 203; *Nichols v. Dowding*, 1 Stark. 81; *Whitcomb v. Whiting*, 2 Doug. 652. Parol evidence was not admissible to contradict the receipt: 3 Stark. on Ev. 999, 1002, 1009; *Flint v. Sheldon*, 13 Mass. 443 [7 Am. Dec. 162]; *Robinson v. McDonnell*, 2 Barn. & Ald. 134; Phil. on Ev. 495, 496, c. 10, sec. 2; *Munford v. McPherson*, 1 Johns. 414 [3 Am. Dec. 339]; *Stevens v. Cooper*, 1 Johns. Ch. 425 [7 Am. Dec. 499]; *Lane v. Neale*, 2 Stark. 105; *Clark v. McMillan*, 2 Car. Law. Rep. 265; *Hoare v. Graham*, 3 Campb. 57; *Hogg v. Snaih*, 1 Taunt. 347. The verdict was against evidence.

Rand, contra, as to the rights of sureties, cited *King v. Baldwin*, 2 Johns. Ch. 557.

By Court, PARKER, C. J. It is moved to set aside this verdict on the ground that it is against evidence, notwithstanding there was a great deal of evidence on both sides, so contradictory that on a former trial the jury could not agree, and on this trial it was the subject of elaborate argument and scrupulous comparison of testimony. If under these circumstances a verdict can be set aside as against evidence, no action can be tried which may not be brought in review before the court upon the facts, and a trial by jury will be virtually superseded. Perhaps no cause which really has two sides to it can be determined without a serious belief in the party losing, and perhaps in his counsel, that the verdict was wrong and against the weight of the evidence. But disputes must be settled and finished, and our law and constitution having given the ulti-

mate decision upon the facts to the jury, to set aside their verdict, unless in extraordinary cases, where it is manifest that they have mistaken or abused their trust, will be to usurp a power which has been carefully and properly withheld from us.

The present case affords an illustration of the principle we feel bound to adhere to. [The chief justice here examined the evidence on the question whether the note of Thayer was taken by the plaintiff in payment of the note in suit or only as a pledge, and concluded by saying that the verdict was not unsupported by the evidence, or so manifestly against the weight of it as to justify the court in interfering.] There are some questions, however, of a legal character which the plaintiff's counsel have very properly raised, and which we are bound to decide.

First, it was objected that the declaration of Ryan as to the terms of the receipt, and of his agreement with the plaintiff in regard to Thayer's note, ought to have been admitted, because he was a party to the contract with the defendant, and the admissions and confessions of one are evidence against the other. We believe it to be a sound principle that the sayings and declarations of one who is a competent witness in a cause, are not to be admitted in evidence to charge another upon the general ground that they are but hearsay evidence, and are not the best evidence which the case affords. Now Ryan was a competent witness; he was equally interested towards both parties; neither party could object to him if offered by the other. He was answerable upon the note himself to the plaintiff, and by the form of the contract he was answerable to Briggs if Briggs was compelled to pay. His deposition was in the case, and he himself was within the city when the cause was tried. We think it impossible to suppose that under these circumstances his declarations should be received to charge Briggs on the subject to which those declarations referred, viz., the terms of the receipt he had taken from the plaintiff and the nature of his agreement with him. In the cases cited by the plaintiff's counsel in support of this objection, the confessions or admissions received were of one of the parties in the action, and where necessarily they must be admitted, and being admitted, they are to affect both. But in this case the plaintiff has chosen to sever the two parties to the note, leaving one out of the writ who is a competent witness; and this puts him upon the footing of other witnesses, so that his declarations, not under oath, can not be admitted to affect the other party to the contract: *Gibbs v. Bryant*, 1 Pick. 118.

Besides, Ryan himself was offered as a witness by the plaintiff, and testified in the cause, so that the plaintiff had the full benefit of his knowledge, and therefore can not complain that his declarations were rejected. All the cases cited from our reports to sustain this objection are where the admissions or confessions proved were made by parties to the action as well as to the contract. And we do not find in any of the other cases cited that the principle is extended further, except where the admission offered is to take the case out of the statute of limitations, and in such cases it seems to be generally admitted that the acknowledgment of one party to the contract, though not sued, is binding upon all the others. There may be other cases in which the acknowledgment of one joint contractor will bind the others; but we know of none like the present, in which Ryan and the defendant between themselves are not joint contractors, but Ryan is the debtor and the defendant is the surety, so that they are not *quasi* partners in the transaction. We do not think that on this ground the verdict ought to be set aside.

Again it is objected, that in summing up the case to the jury the defendant was treated as a surety, and therefore as entitled to some grounds of defense which would not affect Ryan if the suit were against him; for it is said the law knows no difference between principal and surety, and whatever will charge the principal will charge also the surety.

In the case of *The People v. Jansen*, 7 Johns. 337 [5 Am. Dec. 275], it was held by the court that whatever would discharge a surety in equity, would be a good defense at law; and this same position was advanced by Lord Loughborough in the case of *Rees v. Berrington*, 2 Ves. jun. 542. The same principle was adopted by this court in the case of *Boston Hat Manufactory v. Messinger*, 2 Pick. 223. The only difficulty seems to be in separating the principal and surety where they are sued as joint contractors, and where they are obliged to plead jointly, as in case of joint or joint and several promisors or obligors; for in such case, at law, it would seem they must stand or fall together, and this was probably the reason, as suggested by Lord Loughborough, of resorting to chancery for the relief of sureties.

Where the surety or his representatives are sued alone, as was the case in *The People v. Jansen*, and as is the case in this action, no such difficulty occurs, and it would be idle to render judgment against a defendant, who, by principles of law ad-

ministered in a court of equity, would have a right to an injunction against the party claiming to enforce such judgment. In this commonwealth, where there is no power to award an injunction against proceedings at law, and where whatever equitable jurisdiction exists is exercised by the same tribunal, the absurdity of driving the party for relief to another process is still more apparent. Now it seems to be a well-settled principle in equity, that a creditor who has the personal contract of his debtor, with a surety, and has also, or takes afterward, property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself, and if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered.

In the case of *Hayes v. Ward*, 4 Johns. Ch. 129 [8 Am. Dec. 554], this doctrine is fully established. The chancellor says: "There would be much equity in the plaintiff's case if it should finally appear that the defendant had by his own act rendered the adequate security, which he took from the principal debtor, illegal and void. The very taking of that security by him may have excited confidence in the surety, and lulled him to sleep, and deprived him of taking other and sound security for his own eventual responsibility until it was too late, and the rights of third persons had intervened." The learned chancellor drew his principle from the great source of equity, the civil law, and he cites many authors to support it; but it is a principle of natural justice also, and therefore ought to be recognized and enforced by the common law. *Law v. E. I. Co.*, 4 Ves. 829, and *Praed v. Gardiner*, 2 Cox, 86, are strong in support of this point.

There are also cases at common law of the same import. In the case of *Commonwealth v. Vanderslice*, 8 Serg. & R. 457, this principle was adopted, and the judge who delivered the opinion of the court says, there is no clearer rule in equity than that where the creditor has the means of satisfaction in his hands and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety can never be called on. And in a subsequent case, *Lichtenthaler v. Thompson*, 13 Serg. & R. 157 [15 Am. Dec. 581], the same principle is acted on; and indeed carried somewhat further, for it is said by the court that when the creditor has the means of satisfaction actually or potentially in his hands and does not choose to retain it, the surety is discharged.

With regard to the question whether the defendant was in point of fact surety or not, it seems that it was not raised at the trial any further than to show that he was properly declared against as an original promisor. The note was made by Ryan to the plaintiff, and the name of the defendant written on the back. Supposing this was done when the note was made (and there was no evidence to the contrary), according to several decisions it was right to declare against him as promisor; but still he stood in relation to Ryan as a surety, and was entitled to any advantages belonging to that character, as he would if his name had been put on the face of the note, when he might prove that he was only surety, and if the creditor had done any act which could in law discharge a surety, he might prove that in his defense.

Mere delay or negligence to call upon or compel the principal to pay, would not give the surety a defense, but acts done which would tend to prejudice him, or deprive him of the power of obtaining indemnity, would, as appears by the case of *Hunt v. Bridgham*, 2 Pick. 583 [13 Am. Dec. 458]. It is said there was no evidence in the case tending to show that Briggs was a surety. But the form of the note was some evidence. The conduct of the plaintiff in obtaining security of Ryan alone on his horse and gig, the declaration of the plaintiff that Briggs was clear of the note, all had that tendency; and it was not put to the jury, because it was taken for granted, in the course of the trial, that such was the relation between Ryan and Briggs. By my minutes of the trial, it appears that the defense was opened by stating: 1. That the note was paid by Ryan; 2. That though by the form of the contract the defendant was chargeable as promisor, yet he was in fact surety for Ryan, and that payment or security given by the principal would discharge him; and in summing up the evidence by the counsel for the defendant, stress was laid upon all the circumstances which tended to discharge him as surety. The plaintiff's counsel, in his closing argument, did not deny that such was the relation of Briggs, but insisted he was, notwithstanding, liable, unless the note was actually paid. In this state of things, I charged the jury. Probably, if the counsel who argued the cause to the jury had been present at this argument, this point would not have been insisted on. At any rate, we think it can not now be taken advantage of. The jury were instructed, that if they believed the plaintiff told the defendant that the note in the suit was paid, intending to be so understood, and that the defendant was clear

of it, as testified by the first witness, and that in consequence the defendant lost an opportunity to secure himself against Ryan, the defendant would be discharged, though in point of law the transaction in relation to Thayer's note was not a payment. We think the charge in this respect was legally correct. It is said there was no evidence, that any such consequence as is supposed, followed; if so, it is not to be presumed that the jury found for the defendant on this point.

As to the conclusiveness of the receipt, the very question was, what did the receipt purport? It was only collateral matter, and therefore capable of being explained. The objection to parol evidence does not apply, where it is "offered, not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but where, on the contrary, it is offered in order to disprove the legal existence or rebut the operation of the instrument:" 3 Stark. Ev. 1015. "In general, where a written document is given in evidence as containing an admission by the adversary, parol evidence is admissible to explain it, or show that it originated in mistake:" Id. 1020.

It is also objected, that the jury were instructed, that if the plaintiff had in his possession personal property of Ryan, which he held as security for this note, and suffered it to pass back into the hands of Ryan without the consent or knowledge of Briggs, the latter would thereby be discharged of his liability. This was certainly right, for such conduct would be a fraud upon a surety. It is said that a creditor may exercise his discretion and surrender one species of security for another, or if he has an excess of security, he may give up a part. Undoubtedly he may, but it is at his own risk. If the part he retains fails, the loss ought to be his own. Fair dealing requires that he should consult the safety of the surety when he has the means in his hands. It is denied that the horse and gig were ever in the actual possession of the plaintiff; but this was a fact for the jury to decide. The witness asked him why he did not keep possession, and instead of denying that he had had possession, he gave a reason for parting with it.

The cases in 1 Gall. 33, and 2 N. H. 448, were cited to maintain the position taken by the plaintiff's counsel, that the character of surety can not be set up, unless it appears on the instrument itself, that the party signed as surety. Neither of the cases goes that length. That in Gallison suggests it as a matter of doubt. The case in New Hampshire also speaks hypothetically; admitting by implication, that if the plaintiff

knew by the form of the contract or otherwise, the fact that the defendant was surety, the objection would be avoided. But this point was not necessary to the decision of either of the cases, and is not adjudicated.

Upon the whole matter, therefore, we think the verdict is right, and that judgment must be rendered for the defendant thereon.

RELEASE OF SURETY by failure to sue, see *Bruce v. Edwards*, 18 Am. Dec. 1, and note; by extension of time given to the debtor, see *Brown v. Wright*, Id. 190, and note.

NAYLOR v. DENNIE.

[8 PICKERING, 198.]

GOODS SHIPPED ARE IN TRANSITU until taken possession of on behalf of the consignee.

RIGHT OF STOPPAGE IN TRANSITU is not defeated by the attachment of the goods on board the vessel as the property of the consignee.

RIGHT OF STOPPAGE IN TRANSITU IS ADVERSE to the consignee, yet is not defeated by a relinquishment by him of the consignment.

WHERE GOODS ON BOARD OF A VESSEL were stated by an officer to be attached, who, however, did not go below or see them, as they were in the lower hold, covered by other goods, but who paid the freight to the master and left a keeper in charge, who took possession several days after, when the goods were hoisted from the hold, it seems that these proceedings constituted a valid attachment.

REPLEVIN for eight cases of steel and a cask of hardware. The defendant was sheriff, and had attached the goods as the property of Pickering in a suit by one Vose. The facts appear from the opinion of the court to whom the cause was submitted.

J. Pickering and Cooke, for the plaintiffs. The attachment was a nullity, the goods not being actually seized: *Lane v. Jackson*, 5 Mass. 163; *Bond v. Padelford*, 12 Id. 394; *Phillips v. Bridge*, 11 Id. 242; *Lyman v. Lyman*, Id. 317; *Knap v. Sprague*, 9 Id. 258 [6 Am. Dec. 64]; *Vinton v. Bradford*, 13 Id. 114 [7 Am. Dec. 119]; *Denny v. Warren*, 16 Id. 420; *Bagley v. White*, 4 Pick. 395 [16 Am. Dec. 353]. Plaintiffs' right to stop in transitu is not defeated by an intervening attachment: *Smith v. Goss*, 1 Campb. 282; *Feise v. Wray*, 8 East, 93; *Northey v. Field*, 2 Esp. 613; *Litt v. Cowley*, 7 Taunt. 169; *Parker v. McIver*, 1 Desau. 274.

S. Hubbard and W. Austin. contra. The officer's return is con-

clusive that the attachment was complete: *Slayton v. Chester*, 4 Mass. 478; *Bolt v. Burnell*, 9 Id. 96; *Eastabrook v. Hapgood*, 10 Id. 313; *Bean v. Parker*, 17 Id. 591. The right of stoppage in *transitu* could not arise, as the consignee was not insolvent when the vessel arrived: *Stubbs v. Lund*, 7 Mass. 453 [5 Am. Dec. 63]; *Ilseley v. Stubbs*, 9 Id. 65 [6 Am. Dec. 29].

By Court, PARKER, C. J. The question presented by this report is, whether the plaintiffs have the property in the goods taken by the defendant under the writ of attachment, in virtue of which he acted; and this depends upon their right to rescind the contract of sale, under which the goods were shipped by their agent in Liverpool. All the facts appear in this case, which by the law merchant are necessary to constitute the right of the vendor to take the goods, before they come into the possession of the vendee. The goods were shipped by the plaintiffs in England to Pickering, a merchant in Portsmouth, on an order sent out by him; they were shipped on his account and risk, upon a credit of four months; they arrived in the port of Boston, but before they were delivered to the consignee, or were unladen from the vessel, they were demanded by an agent of the plaintiffs, who had procured a relinquishment of the consignment, the consignee having become insolvent. There can be no doubt that the goods were then in *transitu*, for notwithstanding the arrival of the vessel, they had not been discharged from the ship, nor had they been taken possession of by any one for the consignee.

What then are the objections to the plaintiffs' right to recover? The owner or master of the ship had no right to retain the goods; for the freight, on account of which alone they had a lien, had been offered to be paid.

But it is said, that before any claim was made for the goods by the agent of the plaintiffs, they were attached by the defendant as the property of Pickering; and the return of the officer is said to be conclusive of this fact. The fact of an attachment is disputed, because, by the parol evidence, it appears that there was no actual seizure of the goods by the officer before the claim of the plaintiffs was made known to the master of the ship. On the other hand, it is said that the officer's return is conclusive of the attachment; and even if it is not conclusive, the officer having made a demand of the goods, tendered the freight, placed a keeper in the vessel, with orders to take possession of the goods as they should come out of the hold, and afterwards having obtained actual possession, the

attachment was complete. We are inclined to this opinion, but we do not think the point material. For if the plaintiffs had the right of stopping and reclaiming the goods, and duly exercised the right, the intervening attachment could not defeat it. This right is founded upon an implied condition in the sale, that if the vendee should become actually insolvent, between the shipment of the goods and the reception of them by the vendee, the vendor shall have the right to rescind the contract and reclaim the goods. To allow an attachment before the transit is at an end, to have effect, will be to defeat a useful and necessary provision of the law merchant.

But it is thought that the transactions between the agent of the plaintiffs and the consignee show that the right of stopping *in transitu* did not exist, or that it was not so exercised as to vest the property in the plaintiffs, because it is alleged that the right is adverse to that of the consignee, and must be exercised adversely; whereas the act of the agent was with the consent, and in virtue of an agreement with the consignee, as is proved by the writings and papers referred to. The case of *Siffken v. Wray*, 6 East, 371, has been cited in support of this doctrine. There are other cases of the same character, all of which show that when the vendor claims title under the vendee, as by indorsement of the bill of lading, or by any other act of transfer, he does not rely upon his own right of stopping *in transitu*; but, on the contrary, he affirms and establishes the sale in a manner inconsistent with that right. We suppose this doctrine is correct; indeed, it has been adopted by this court in the case of *Lane v. Jackson*, cited in the argument. But we understand this doctrine to mean no more than that the right of stopping *in transitu* can not be exercised under a title derived from the consignee, nor that it shall be exercised in hostility to him; for we find it laid down in the same case of *Lane v. Jackson*, and in *Feise v. Wray*, 3 East, 93, that the consignment may be refused, and that, even by the direction of the consignee, some stranger may be appointed to take possession of the goods for the consignor, though he may be absent, and if he consents afterwards, the rescinding of the sale is complete.

This explanation of the doctrine is recognized in *Scholfield v. Bell*, 14 Mass. 40, in which case even the indorsement of the bill of lading by the consignee was not held to affect the right of stopping *in transitu*, it appearing that the act was done with a view to facilitate the rescission of the contract. In this case, the consignee has done nothing more than relinquish his com-

assignment, and the plaintiffs depend upon their original property, and not upon any transfer or conveyance from the vendee.

It is objected also to the exercise of this right by the plaintiffs, that the consignee did not become insolvent until after the arrival of the goods; by which it is supposed to be meant that his insolvency was not known or declared. But we do not see how this can affect the question. We do not find that the right of stopping depends upon a declared insolvency or open bankruptcy, before the arrival of the goods. It is enough that the affairs of the consignee are so involved, that he is unable to pay for the goods, if he was to pay on delivery; or, that he has become actually insolvent before he shall have taken possession.

The insolvency of this consignee was public before the goods came to his possession, and before the plaintiffs claimed them; which is enough to establish their right.

PARKS v. BOSTON.

[8 PICKERING, 218.]

THAT POWER IS JUDICIAL which is vested in the mayor and aldermen of the city of Boston, as to laying out or widening streets, "whenever in their opinion the safety or convenience of the inhabitants of said town shall require it," and a certiorari lies to remove their proceedings in such a case.

WHERE THE MAYOR AND ALDERMEN ADJUDGE NECESSARY the widening of a certain street, the fact that a private individual gave a bond to contribute to the expense will not vitiate the proceedings, if such bond was not made the basis of their adjudication, and the benefit really for the individual and but colorably for the city.

PETITION for certiorari. The opinion states the case.

Rand, for the petitioner. Certiorari lies in this instance: *Commonwealth v. Sessions of Middlesex*, 9 Mass. 388; Com. Dig., Certiorari, A, 1; *Groenwell's case*, 1 Ld. Raym. 454; 8 O., 1 Salk. 144; *Anonymous*, Id. 146; *Rex v. Liverpool*, 4 Burr. 2244. The mayor and aldermen have exceeded their powers, as they have laid out this street on the ground of the indemnity offered, and not exclusively at the expense of the city: *Commonwealth v. Sawin*, 2 Pick. 547; *Commonwealth v. Cambridge*, 7 Mass. 158.

Pickering and Curtis, contra. Certiorari does not lie to review the discretionary acts of a lower tribunal: Com. Dig., Cer-

tiorari, A, 1: *The King v. Reeve*, 1 W. Bl. 233; *Lawton v. Commissioners of Cambridge*, 2 Cai. 181; *The King v. King*, 2 T. R. 234. The board in this case did not act judicially, but ministerially: *Baxter v. Tuber*, 4 Mass. 361; *Harlow v. Pike*, 3 Greenl. 438. The granting of this writ is discretionary with the court, and they will not grant it unless injustice has been done: Com. Dig., Certiorari, D; *Drown v. Stimpson*, 2 Mass. 245; *Ex parte Weston*, 11 Id. 417; *Lees v. Childs*, 17 Id. 351.

By Court, WILDE, J. This is a motion for a writ of certiorari to the mayor and aldermen of the city of Boston, to remove their proceedings in laying out and widening a certain street, called Doane street, which proceedings the complainant alleges are erroneous and irregular. To this motion two objections are made on the part of the respondents: 1. That a writ of certiorari will not lie to the mayor and aldermen, they not being constituted, as it is said, a judicial tribunal. 2. That the proceedings are valid and in no respect erroneous.

In regard to the first objection, the question is, whether the power vested in the mayor and aldermen, as to the laying out and alteration of streets and ways, is judicial or ministerial. By the statute of 1804, c. 73, the selectmen of the town of Boston were empowered to lay out or widen any street, "whenever, in their opinion, the safety and convenience of the inhabitants of said town shall require it." And by the thirteenth section of the city charter this power is vested in the mayor and aldermen. We can not doubt that the power thus conferred is judicial, for before the mayor and aldermen can proceed to lay out a new street, or to widen an old one, they are required to adjudge on the question whether the safety or convenience of the citizens requires such a laying out or alteration. It is a power similar to that vested in county commissioners in relation to highways, and no reason can be given why a writ of certiorari should lie to those commissioners and not to the mayor and aldermen of the city of Boston. Whether certiorari will lie to quash the proceedings of the selectmen of other towns in the laying out of town ways, is a question not raised in this case; for the power vested in the mayor and aldermen is essentially different from that vested in the selectmen of towns. They have only the power to lay out town ways, but not to establish them. This can only be done by the authority of the town.

It has been contended that certiorari will not lie to a court newly instituted and empowered to proceed by methods unknown to the common law, and a case from Siderfin was cited

in support of this position. This is true as to writs of error, but not as to writs of certiorari. The law seems to be well settled that certiorari may be awarded to remove the proceedings from any inferior court, whether it be of ancient or newly created jurisdiction, or whether it proceeds according to the course of the common law or not: *Bac. Abr.*, Certiorari, B; also, Error, A, 3, and the cases there cited. This doctrine was laid down in the case of *Groenwell v. Burwell*, 1 Salk. 144, in which it was held that certiorari would lie to the censors of the college of physicians. It is more fully reported in 1 *Ld. Raym.* 469, and appears to have been a case well considered. So it was decided in a case cited in *Groenwell v. Burwell*, that a certiorari would lie to commissioners of sewers. The same principle was maintained in the case of the *Caerdiffe Bridge*, 1 *Ld. Raym.* 580, where the court say they will examine the proceedings of all jurisdictions created by act of parliament, to the end that the court may see whether they keep themselves within their jurisdiction. And in the case of *Lawton et al. v. Commissioners of Highways, etc.*, 2 Cai. 182, Spencer, J., says, that "the authorities to the point decided in the case of the *Caerdiffe Bridge* were so numerous and uniform, that it could not be necessary to enlarge." And he adds, that "the necessity of a superintending power to restrain and correct partialities and irregularities which may be committed by inferior officers, is so obvious and indispensable, that the court ought by no means to deny themselves a power of such salutary influence." So in the case of *Wood v. Peake*, 8 Johns. 54,¹ it was held that the appointment of a constable by three justices, they having jurisdiction of the subject-matter, is a judicial act, and remains valid until it is set aside or quashed in the regular course by certiorari; and the same principle is recognized in the case of *Wildy v. Washburn*, 16 Johns. 49. Cases might be multiplied, but it would be useless.

The uniform distinction is between judicial and ministerial acts; the former being only voidable for error, and the latter being merely void if not done in pursuance of lawful authority. And as judicial acts are valid until reversed for error, a writ of error or a certiorari will lie in all such cases. If the proceedings are in a court of record, according to the course of the common law, a writ of error is the proper remedy to reverse or vacate an erroneous judgment, otherwise the remedy is by certiorari.

2. The remaining question is, whether these proceedings are

1. 8 Johns. 62.

erroneous. The error assigned is, that the petitioner's land was taken for the accommodation of private individuals, and not for public uses, in violation of the tenth article of the declaration of rights. But this, we think, has not been made to appear. The record shows that the mayor and aldermen have adjudicated on the subject, and that they expressly resolved that the public safety and convenience required that the street in question should be widened. The sum of three thousand five hundred dollars was appropriated to that purpose, and it does not appear with certainty that the sum was not sufficient to defray the damages and expenses resulting from the measure; but if this did appear, it would not prove that the land taken was not appropriated to public use. If the public necessity and convenience required the alteration, it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon the city has no tendency to prove that the enlargement of the street was not a public benefit. A street or highway is not the less public, because it accommodates some individuals more than others; for this is the case in regard to all streets and ways, and is as applicable to Washington street as to the most insignificant lane in the city. All town ways, although in the Stat. 1786, c. 67, they are denominated particular and private ways, are, in truth, public highways; for the public, without discrimination, has the right to use them. And this is true as to all open ways, and it is emphatically true in respect to the streets of the metropolis and other large towns; nor is it material at whose expense such streets are laid out or altered. If the legislature should provide for its being done at the expense of the abutters, this clearly would be valid, and no infringement of the tenth article. Such we understand the law to be in New York, and its validity, we believe, has never been questioned, although it is well known that the principle asserted in our tenth article of the declaration of rights has ever been held sacred by the courts of that state, as a principle of natural justice and universal obligation.

As to the case of *Commonwealth v. Sawin*, 2 Pick. 547, it is distinguished from this in a most important point. In that case it appeared that common convenience and necessity did not require the road prayed for to be laid out wholly at the expense of the town; and it was so adjudged by the court of sessions. And it is expressly said in that case, that the court did not decide that a bond given by an individual interested in a road, to relieve the town, was illegal; but only that such a bargain should

not be the basis of an adjudication in favor of a road. And the same distinction is noticed by Parsons, C. J., in the case of *Commonwealth v. Cambridge*, 7 Mass. 167. His remarks are applied to streets or ways laid out "colorably for the use of a town, but really for the benefit of an individual."

In the present case it has been adjudicated, in unqualified terms, that the public safety and convenience required that the street in question should be widened. The bond given by Adams and others is not made the basis of the adjudication, and it is impossible for us to determine that it would not have been made, if no such bond had been given. This is a matter of conjecture, upon which no certain judgment can be founded. Every presumption is to be made in favor of the regularity of the proceedings, and they are not to be vacated, unless it can be made to appear with certainty that they are irregular or erroneous, and this certainly does not appear. The proceedings of the mayor and aldermen, previous to the final adjudication, may well be considered without giving them a strained construction, as proposals thrown out with a view to procure aid towards defraying the expenses of the proposed measure, and thus to relieve the city from a part of the public burden; and in this there was nothing illegal or irregular.

We are therefore of opinion that there is no error in the proceedings, and that the petition for a certiorari must be dismissed.

CERTIORARI TO REVIEW PROCEEDINGS OF GOVERNMENTAL BOARDS.—See note to *Mayor v. Morgan*, 18 Am. Dec. 236.

BOYNTON v. REES.

[8 PICKERSGILL, 329.]

WHERE A GRANT WAS MADE OF A RIGHT to erect a dam on the grantee's land on one side of a stream, to the grantor's land on the other, at about sixty rods below certain mills of the grantor, the erection of the dam more than sixty rods below and its subsequent removal twenty rods higher up, but still below the sixty rods, without objection on the part of the grantor, will be presumed within the intent of the parties to the conveyance.

A GRANT IS NOT INVALID BECAUSE NO CONSIDERATION is expressed in the deed. He who seeks to avoid a conveyance as voluntary and fraudulent must show that no consideration was paid.

NOTICE TO SUBSEQUENT PURCHASERS of the grantor's land of the grant of a right to erect a dam will not be conclusively presumed, from the erection

and occupation of the dam by the grantee for six months in the year, and by a stranger for the other six months.

A PURCHASER WITHOUT NOTICE of an incumbrance can convey land free of the incumbrance to one having notice.

DECLARATIONS OF ONE INTERESTED in land under a written agreement are not admissible, concerning the terms of such agreement, without evidence of the loss of the instrument.

TRESPASS *q. c. f.* for entering plaintiff's close, and pulling and tearing away his dam across Williams' river. The defendant pleaded that the *locus in quo* was his soil and freehold, and the general issue. It appeared that Williams, in June, 1794, conveyed to Newall a lot of land on the east side of the river, and in August of the same year conveyed to him the right to build and maintain a dam across the river about sixty rods below Williams' mills, and adjoining on one side of the river to land lately sold to Newall, on condition that the dam should not so raise the water as to obstruct Williams' mills. Newall covenanted to observe the condition. No consideration was expressed. The plaintiffs claim all of Newall's right. A dam was built across the river in 1794, more than sixty rods below Williams' mills, and subsequently removed twenty rods higher, but not so high as to obstruct said mills, and the dam had remained in this position some years when the supposed trespass was committed. The dam was built at the joint expense of Newall and one Rathbone, who had enjoyed a water privilege on the east side of the river. Rathbone proceeded to testify as to the terms of the written agreement between him and Newall in relation to the dam, but his testimony was rejected. Several persons claiming under Rathbone had kept up the dam down to the time of the defendant's occupation. The defendant claimed under certain *meane* conveyances from one Thayer to whom Williams conveyed his lands on the westerly bank. None of the conveyances referred to the easement granted to Newall. There was evidence tending to show that Thayer knew of the conveyances to Newall, and also evidence that the defendant had knowledge of it when he purchased.

The cause was submitted, subject to the opinion of the court.

Dwight and Porter, for the plaintiffs.

Bishop and Byington, *contra*.

By Court, PARKER, C. J. This case can not be decided, we think, without a trial by jury, in order to ascertain some facts in controversy, which are essential to a correct view of the case, In the first place, as to the plaintiffs' title to the *locus in quo*,

it depends first upon the conveyance by Williams to Newall of the right to lodge his dam upon the west side of the stream. This instrument, we think, gave the right to fix the dam anywhere within the limits mentioned in the instrument; and the change of its original position, acquiesced in by the proprietors of the land, was justifiable, and will be presumed to be according to the intention of the parties to the conveyance. This settles one point. We also think that the objection to the instrument, because no consideration is mentioned in it, is invalid. The deed itself imports a consideration, and to avoid it as a voluntary conveyance, fraudulent against subsequent purchasers, the party objecting must prove that no consideration was given.

But the difficulty in this part of the case with the plaintiffs is the want of notice of the existence of this right in them, when subsequent *bona fide* purchasers took their conveyance of the land on the west side, after Thayer, against whom personally notice is sufficiently proved. Whether those to whom Thayer conveyed are to be charged with notice is matter for the jury. The facts of the existence of the dam at the time of their purchases and of the occupation of it under Newall are not of themselves notice, though with other facts which may be proved, they may be satisfactory evidence of notice. The fact that the present defendant had direct notice when he purchased is not conclusive against him, according to the principle established in *Trull v. Bigelow*, 16 Mass. 406 [8 Am. Dec. 144], which we believe to be approved law.

The other branch of the case, which relates to the supposed rights of the defendant under Rathbone to a tenancy in common with the plaintiffs, is also attended with difficulties, which can be removed only by a trial. Had Rathbone not stated that whatever right he had subsisted in a written agreement between him and Newall, the fact of his having aided in building the dam by paying for one half, and using it so long for his fulling mill, would make it a fair case for the presumption of a grant. But there being such a writing, it ought to be produced, for it may so qualify Rathbone's right as to destroy any claim now under him. At the trial it did not appear that the paper was lost, or that any pains had been taken to procure it. On another trial it may be produced by one party or the other, for it is certainly doubtful on which side it will be favorable, or the party seeking it may perhaps entitle himself to proof of the contents by Rathbone. Under these circumstances a trial must be had, which, indeed, was expected when the cause was

opened the last time, it being taken from the jury with a view to settle such questions of law as might arise out of controverted facts.

New trial granted.

WOODBUFF v. HALSEY.

[8 PICKERING, 333.]

A MORTGAGEE OF PERSONALTY MAY MAINTAIN TRESPASS against one who takes it from the possession of the mortgagor, although at the time the debt is not due.

A MORTGAGEE OF A BUILDING ON A THIRD PERSON'S LAND may maintain trespass against a stranger who tears it down, and carries the materials away, it being unoccupied, and not in the actual possession of the mortgagee at the time.

TRESPASS LIES AGAINST ONE WHO CARRIES AWAY the materials of a building, although he did not assist in the pulling down.

TRESPASS *q. c. f.* for pulling down a blacksmith's shop belonging to the plaintiff, with counts for carrying away the materials. Pleas, the general issue. The shop stood on land belonging to one Compton; was originally owned by one who, with his wife, mortgaged it to the plaintiff. Before the debt, to secure which the mortgage was given, was due, Halsey pulled down the shop, and defendant carried away some of the materials. Verdict against each of the defendants, in the sum of seventy-five dollars against Halsey, and two dollars against Avery. Judgment was to be entered or a nonsuit granted, according to the opinion of the court.

Dwight and Bishop, for the defendants, contended that the mortgagor alone could maintain the action: *Hitchcock v. Harrington*, 6 Johns. 290 [5 Am. Dec. 229]; *Runyan v. Mersereau*, 11 Id. 534 [6 Am. Dec. 393]; *Hatch v. Dwight*, 17 Mass. 289 [9 Am. Dec. 145].

Porter, contra. The plaintiff had the right of possession, and, therefore, could maintain the action: *Putnam v. Wyley*, 8 Johns. 337 [5 Am. Dec. 346]; *Wheeler v. Train*, 3 Pick. 255; *Thunder v. Belcher*, 3 East, 449; *Newall v. Wright*, 3 Mass. 138 [3 Am. Dec. 98]; *Stowell v. Pike*, 2 Greenl. 387; *Smith v. Goodwin*, Id. 173; *Starr v. Jackson*, 11 Mass. 519; *Fay v. Brewer*, 3 Pick. 203.

By Court, PARKER, C. J. In regard to personal property or chattels, the law is that trespass may be maintained by one who

has the actual or constructive possession. Constructive possession is where the general owner, although the chattel is in the actual possession of another, has the right to reclaim it immediately, the person in possession not being entitled to retain it against his will. A strong case to illustrate this position is put in *Bac. Abr.*, Trespass, O, 2. If the owner of a chattel which is in York, gives it to J. S., who is in London, and it is taken or injured by a stranger, J. S. may maintain trespass.

The blacksmith's shop, the subject of this suit, was mortgaged to the plaintiff to secure the payment of a debt in two years. We presume this mortgage to be valid against Henry S. Halsey, the mortgagor. The plaintiff, as mortgagee, had a right to the possession immediately. At the time the shop was pulled down it was unoccupied, and therefore the possession was, according to the title, in the mortgagee. It is very clear that he had a right to an action of trespass for destroying it.

As to the other defendant, he was a trespasser in taking away the materials; the trespass was complete when he moved off with the lumber, and the right of action then vested. The subsequent transactions with Fosket could not amount to a release, accord, or relinquishment.

POSSESSION TO MAINTAIN TRESPASS.—This subject is treated in the note to *Orrer v. Storms*, 18 Am. Dec. 546.

FARNUM v. PLATT.

[8 PICKERING, 239.]

RESERVATION IN DEED.—The owner of land having leased a stone quarry thereon for a term of years, conveyed the land, reserving the use of the quarry until the expiration of the lease. During the continuance of the term the lease was canceled by consent: *Held*, that this did not extinguish the reservation, but that it would continue until the end of the term.

WHERE THE WAY COMMONLY USED IS CLOSED by the act of the owner of the land, the way not being limited or defined, the one having the easement may pass to and fro in the manner least prejudicial to the owner.

TRESPASS q. c. f. for breaking and entering plaintiff's close and carrying away marble. The case appears from the opinion. Verdict for the plaintiff subject to the opinion of the court.

Hubbard and Hubbell, for the plaintiff.

O. A. Dewey and Briggs, contra, contented that canceling the lease did not destroy the estate created by it: *Matthewson's*

case, 5 Coke, 23; *Harrison v. Owen*, 1 Atk. 520; *Bolton v. Carlisle*, 2 H. Bl. 259; *Roe v. York*, 6 East, 86; *Hatch v. Hatch*, 9 Mass. 312 [6 Am. Dec. 67]; *Marshall v. Fisk*, 6 Id. 24 [4 Am. Dec. 76]; *Commonwealth v. Dudley*, 10 Id. 403.

By Court, PARKER, C. J. The principal question in this case is upon the construction of a clause in the deed of Garlick to the plaintiff, which is in terms a reservation of the right to use a stone quarry upon one of the lots described in the deed.

Before the execution of this deed, Garlick, then owner of the land, had leased the quarry, with the right of ingress and egress, to Middlebrook and others, for ten years then unexpired. The object of the reservation was to secure the rights of the lessees during the continuance of the lease; and the presumption of law is, that whatever diminution of value this occasioned to the title conveyed to the plaintiff, was accounted for in the consideration paid. This lease, or agreement which had the effect of a lease, was, by consent of all the parties to it, canceled after the execution and delivery of the deed to Farnum, and he contends that on such cancellation he held the land under the deed free from the right secured by the reservation. We do not think this is the true construction of the reservation; but that its effect was to exclude from the operation of the grant, the use of the quarry by Farnum, during the time provided in the agreement for its continuance. This is the most natural construction, and such as was intended by the parties at the time. The words "until the expiration of the lease" mean, until it shall expire according to the terms of it, and not the termination of it by a new agreement between the parties to it. And the reservation enures to the use of the lessor as well as the lessee; for it saves the quarry from the operation of the deed, for the time, as much as it would if the reservation had been for the unexpired time, without any mention of the lease. Therefore Garlick, or those lawfully holding under him, would not be liable in trespass for taking stones from the quarry.

And as the way used for access to the quarry was not limited or defined, the shutting up the way commonly used gave the right to pass to and from, in any course least prejudicial to the owner of the land. This, according to the verdict of the jury, was done by the defendant in this case.

Plaintiff nonsuit.

CLARK v. LAMB.

[8 PROCEEDINGS, 415.]

A VERDICT IN THE SUPREME COURT MAY BE AMENDED by the judge's notes, after error brought and joinder in error, upon payment of costs.

Writ of error to reverse a judgment of this court. The original writ contained but one count for money had and received by Clark to the use of Ezekiel Lamb as executor of Daniel Lamb. At the return term, counts were filed for money had and received to the use of the testator, and a promise in consideration thereof to pay the executor; on an *insimul computassent* between Ezekiel, as executor, and Clark, of money due to the executor and a promise to pay him, as such, and for money had and received to the use of the testator, and a promise to pay the testator. Clark pleaded *non assumpsit* to the whole declaration, on which issue was joined to the country; the statute of limitations as to the executor, on the first, second, and third counts; the statute of limitations as to the testator on the fourth count, on each of which pleas issue was joined; and *non assumpsit infra sex annos* to the whole declaration. Verdict before Wilde, J., that "the defendant, Clark, did promise the plaintiff, E. Lamb, in manner and form, as he has alleged in his declaration, within six years next before the commencement of said action," and damages assessed. Judgment accordingly. Error assigned was, that the verdict did not find the whole of the issue joined. After error brought, Judge Wilde certified from recollection that the principal part of the evidence offered by the plaintiff was applicable to the second and third issues, and that it tended to show that Clark had fraudulently obtained from the testator divers notes of hand due to him, and had collected some of the notes within six years before the commencement of the action; that the greater part of the plaintiff's evidence applied to this subject of inquiry; and that there was no sufficient evidence to support the verdict as to the amount of damages, unless the jury had found for the plaintiff as to the notes of hand so collected.

G. Bliss and J. H. Ashmun contended that the verdict could not be amended after judgment: *Grant v. Aslle*, 2 Doug. 722; *Brown v. Chase*, 4 Mass. 436; *Hutchinson v. Crossen*, 10 Id. 251; *Atkins v. Sawyer*, 1 Pick. 351 [11 Am. Dec. 188].

Bates and Dewey, contra, relied on *Petrie v. Hannay*, 8 T. R. 659; Stat. 1784, c. 29, sec. 14; *Williams v. Hingham Turnpikes*, 4 Pick. 349.

By Court, WILDE, J. The question now to be decided on this writ of error is, whether the verdict in the original action may be amended conformably to the facts as certified by the judge; and we are clearly of opinion that, according to all the authorities, it may be so amended.

In the case of *Chapman v. Gale*, 2 Lev. 22, which was debt against an executor, judgment was entered up against him *de bonis propriis*, and thereupon error was brought, and it was assigned that the judgment should have been *de bonis testatoris*, si, etc. Upon the affidavit of the attorney, that he gave his clerk instructions to enter it up according to the plea, and that it was a mere mistake of the clerk, the judgment was amended.

In the report of this case by Keble (2 Keb. 810),¹ it is said that the amendment was allowed by consent of parties; but Levinz is rather to be relied on; and of this opinion was Lord Mansfield, in the case of *Short v. Coffin*, 5 Burr. 2730, in which a similar amendment was allowed after a writ of error brought and *in nullo est erratum* pleaded. In the case of *Doe v. Perkins*, 3 T. R. 749, it was decided that the postea may be amended by the judge's notes at any time, even after final judgment and writ of error brought, and it was said this practice was as ancient as the time of Charles I. So in the case of *Rees v. Morgan*, 3 T. R. 349, a judgment was amended after writ of error brought, and also in the cases of *Usher v. Dansey*, 4 Man. & Sel. 94; *King v. Keat*, 1 Salk. 47; *Elliot v. Skipp*, Cro. Car. 338; *Eddowes v. Hopkins*, 1 Doug. 376; and *Williams v. Brendon*, 1 Bos. & P. 329. But the case of *Petrie v. Hannay*, 3 T. R. 659, is directly in point, and can not be distinguished from the case under consideration. There the defendant pleaded the general issue and the statute of limitations. A verdict was found for the plaintiff on the first issue, and no notice taken of the last. After error brought, and joinder in error, which was assigned on this point, the court allowed the verdict to be amended by the judge's notes, on payment of costs. In the case of *Harrison v. King*, 1 Barn. & Ald. 161, an amendment was refused; but this was after a lapse of eight years from the rendition of judgment, and seven years after the writ of error had been brought and after the reversal of the judgment; so that the defendant in error had, as Lord Ellenborough thought, slept the sleep of death over his rights. Abbott, J., says: "The application should be made recently after the trial, for the judge bears then in memory much of what has

1. *Chapman v. Gayl*, 2 Keb. 810.

passed at the trial; whereas it is impossible to suppose, that at a great distance of time, any human memory can recollect the circumstances." This case, therefore, is not opposed to the general rule, but rather confirms it with a reasonable qualification, so that the course of practice in England has been long well established, and it has been adopted here so far as cases have occurred requiring its salutary aid: *Barnard v. Whiting*, 7 Mass. 358; *Barnes v. Hurd*, 11 Id. 57; *Sullivan v. Holker*, 15 Id. 374; *Patten v. Gurney*, 17 Id. 182 [9 Am. Dec. 141]. And I can not imagine any reasonable objection that can be made to this course of practice; on the contrary, a different course, as contended for by the plaintiff's counsel, would greatly obstruct the administration of justice. In all proceedings mistakes will occur, notwithstanding all ordinary care, and when they do thus happen, they ought, if possible, to be corrected without injury to either party. The course of practice adopted by the courts was founded on this principle, and it applies with perfect justice to the present case. If there were any doubt as to the facts which occurred at the trial, or any question made, whether there had been a full trial on the merits, the proper course would be to grant a *venire de novo*. But the case has been fully heard and considered, both as to the facts and the law; and upon the merits of the case there can be no question which has not been already disposed of.

The effect of the statute of limitations was fully considered, and a large portion of the original plaintiff's demand was thereby barred. The only error or mistake arose from a mere slip in drawing up the verdict, and clearly this ought not to be allowed to vacate the judgment. The verdict is, therefore, to be amended, and on payment of costs the plaintiff in error is to become nonsuit.

AMENDING SPECIAL VERDICT.—In the subsequent decision of *Walker v. Dewing*, page 520 of this same report, Chief Justice Parker had occasion to pass upon the power of the court to amend a special verdict, and he came to the conclusion, speaking on behalf of his associates as well as of himself, that without the consent of the parties there could be no amendment of such a verdict.

OXFORD BANK v. HAYNES.

[8 PICKERING, 423.]

INDORSING ON A NOTE, "I guarantee the payment of the within note," makes the party a guarantor and not a surety.

A GUARANTOR OF A PROMISSORY NOTE will be discharged by neglect of the holder to demand payment and give notice of non-payment, provided the maker was solvent when the note fell due, and since becomes insolvent.

ASSUMPSIT on a promissory note, charging the defendant as guarantor in one count and as promissor in another. The note was made by Smith and Anderton as principal and surety; on the back was written, "I guarantee the payment of the within note." The note in this form was discounted at the bank. It was not paid, but notice of non-payment was not given to Haynes until nine months after its maturity. In the mean time, subsequently to the maturity of the note, Smith and Anderton failed, having considerable visible property, more than sufficient to pay the note, which was immediately attached by other creditors. The cause was submitted on these facts.

Barton and Merrick, for the plaintiffs, contended that this engagement was one of suretyship: *Hunt v. Adams*, 5 Mass. 358 [4 Am. Dec. 68]; *Cobb v. Little*, 2 Greenl. 261 [11 Am. Dec. 72]; *Carver v. Warren*, 5 Mass. 545; *Phillips v. Asling*, 2 Taunt. 206; *Warrington v. Furber*, 8 East, 242. A guarantor by blank indorsement has been regarded precisely as a surety: *Josselyn v. Ames*, 3 Mass. 274; *Moies v. Bird*, 11 Id. 436 [6 Am. Dec. 179]; *Sumner v. Gay*, 4 Pick. 311; *Upham v. Prince*, 12 Mass. 14; *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 286].

Washburn, contra. The contract in this case was one of guaranty: Fell on Guar. 1; *Phillips v. Asling*, 2 Taunt. 206. Payment ought to have been demanded: Com. Dig., Principal and Surety, K, 2; *Morris v. Cleasby*, 4 Mau. & Sel. 574; *Moakeley v. Riggs*, 19 Johns. 69 [10 Am. Dec. 196], and notice of non-payment should have been given: *Bank of New York v. Livingston*, 2 Johns. Cas. 409; *Sturgis v. Robbins*, 7 Mass. 301; *Holbrow v. Wilkins*, 1 Barn. & Cress. 10. The gross laches here, has discharged the guarantor: *Gremer v. Higginson*, 1 Mason, 339; *Russell v. Perkins*, Id. 368; *Duval v. Trask*, 12 Mass. 154; *Peal v. Tullock*, 1 Bos. & P. 419; *Gibbs v. Cannon*, 9 Serg. & R. 202 [11 Am. Dec. 699].

By Court, PARKER, C. J. It is very clear from the facts stated, that the bank might easily have secured the amount of the note, had they attempted to do it when it became payable, or within a month afterwards; and that Haynes, the defendant, had he been seasonably called upon and been notified of the non-payment of the note, might, without difficulty, have obtained security from the property of either or both of the promisors.

Had he been an indorser of the note, most clearly by the above facts he would have been discharged, not only because the condition of giving notice was not strictly complied with, but because there was gross negligence on the part of the bank, and a new credit given to the promisors without the consent of the indorser. Haynes, therefore, can not be liable, unless by the form of his contract he became answerable at all events, and unconditionally, for the payment of the note. And it is contended that this is the legal effect of the contract of guaranty into which he entered.

It is somewhat extraordinary, that the nature of this contract, and the extent of the liability it creates, are not very clearly settled in the books. It has been sometimes held to be an absolute, sometimes a conditional obligation. Sometimes a guarantee has been deemed a surety, and at others, not more than an indorsee. And this, perhaps, has arisen from the different forms in which the contract has been made. In several cases, where the party put his name on the back of the note, without any words written over it at the time, he not being the payee of the note, he has been charged as an original promisor, being considered in the light of a surety, and he has been declared against as such; but in these cases his signature was given at the time of making the note, or in so short a time afterwards, and under such circumstances, as to have relation to the making of the contract originally. The case of *Josselyn v. Ames* is of the first class, and that of *Moies v. Bird* [6 Am. Dec. 179] of the second. In other cases, the signature of a third party, not named in the note, has been given a long time after the making of the note, and without any circumstances showing that this third party had any concern in the original contract. Such was the case of *Ulen v. Kittredge*, 7 Mass. 233.

In the first class of cases, the holder of the note has been allowed to treat the person whose name is on the back, as a surety or original promisor, without any proof of consideration other than as against the person who signed his name under the note, or of any actual promise on his part to pay, except what is derived from his signature to the note. In the second class of cases, proof has been required of the promise or engagement to become liable, and he is to be charged in no other form than is consistent with that engagement; and it being a collateral engagement to pay the debt of another, there must be proof of a consideration for the promise. The distinction is clearly stated in the case of *Hunt v. Adams*, 5 Mass. 361 [4 Am. Dec. 68].

But the cases above cited, where the party signing on the back of the note has been held to be an original promisor, are where the signature is in blank, and not where a special undertaking is written over it. In such cases the party is chargeable; the note not being negotiable gives authority to the payee or holder to write over his signature such words as will bind him to the payment not as indorser, for he can not be such technically to a note not negotiable, but as promisor, surety, or guarantee, at his election. No such authority exists, where the tenor and form of the undertaking are already drawn out before the signature of the party.

In the case before us, the signature of the defendant was not in blank, but under the words written by the cashier, the agent of the plaintiffs, which import a guaranty only. This is the only character in which he can be made liable, and if by law a guarantee is not an original promisor, he can not be sued as such. We therefore must consider what is the liability of a guarantee upon a promissory note; whether he is liable at all events, or only upon condition, and if the latter, whether the condition has been here performed.

This is the point which we think is undecided in this commonwealth, though there may have been many allusions to it in cases such as have been mentioned, in which the question was in relation to the liability of a surety, or of one who put his name on a note not negotiable, or where the party so putting his name had no authority to assign, not being the payee. But no case in which the contract was in terms a guaranty, and so intended by the parties, has been presented to the court. That a guarantee differs in character from a surety can not be questioned, for he can not be sued as a promisor, as the surety may; his contract must be specially set forth. That he differs from an indorser is equally clear, and for the same reason, and also because he warrants the solvency of the promisor, which the indorser does not, he being answerable in a strict compliance with the law by the holder, whether the promisor is solvent or not. There are cases which adopt a distinction which is reasonable and just, in which the guarantee is discharged only by the joint effect of negligence on the part of the holder and an actual loss or prejudice to the guarantee in consequence of that negligence. It is certainly conformable to the general principles of right and justice, that the creditor who knows of the delinquency of his debtor, and withholds information of it from the guarantee, by reason of which the debt is actually lost when

it might have been saved by either, should not throw the loss upon the guarantee. It is contrary to the general principles of equity, upon which the law of contracts is considered to rest. Can it be supposed that a creditor holding the note of one thought to be in good credit, and who has ample means of paying, shall have a right, when he finds there is an inability to take up the note on its becoming due, to receive partial payment, give further credit, and thus put the debt in jeopardy, and after he has indulged the debtor *ad libitum*, shall call upon the guarantee for the deficiency, when absolute insolvency has taken place and all other creditors have saved themselves out of his effects? This would offend all the analogies of the law, which require good faith and diligence to enable a creditor to call upon parties consequentially liable, and would place a guarantee in a worse condition than a surety, who, being an original promisor, may take up the note when it becomes due and sue the principal immediately. The glaring injustice of such a position has been discountenanced by those courts which have had the question presented distinctly to them.

In 8 East, 242, Lord Ellenborough says the same strictness of proof is not necessary to charge the guarantee as would have been necessary to support an action on the bill itself that is against an indorser, where by the law merchant a demand upon and refusal by the acceptors must have been proved in order to charge the other party on the bill, and this notwithstanding the bankruptcy of the acceptors. Guarantees insure the solvency of the principals, and therefore if the latter become bankrupt and notoriously insolvent, it is the same thing as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them. Lawrence, J., says, though proof of demand of the acceptors, who had become bankrupt, were not necessary to charge the guarantees, yet the latter are not prevented from showing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them. Le Blanc, J., says, it is sufficient as against the guarantee, that the holder of the bill could not have obtained the money by making a demand upon the bill. And in 2 Taunt. 206, it was decided that a guarantee is entitled to notice, if the parties to the bill are not insolvent at the time it is due.

But the principle is more accurately and intelligibly stated by Duncan, J., in the case of *Cannon v. Gibbs*, 9 Serg. & R. 202.¹ "I think," says he, "upon a review of these cases, the

1. *Gibbs v. Cannon*, 9 Serg. & R. 202.

line is clearly marked out. It is this: that the guarantor is discharged, if notice is not given of non-payment to him, that he may avail himself of proper presentment, demand, and of due notice of non-payment where the drawer and indorser, or either of them, are solvent at the time the note became due. But where both are then insolvent, this would be *prima facie* evidence that a demand on them, and notice to the guarantor, would be of no avail, and therefore the giving notice to a guarantor, not a party to the bill, would be dispensed with, the presumption being that the guarantor was not prejudiced by the want of notice."

And this seems to be the true ground; for it leaves the loss upon the party whose gross negligence is the cause of loss to any one, instead of throwing it upon him who would suffer entirely from the carelessness of the party who would recover of him. Upon this principle we decide the present case in favor of the defendant, without trenching at all upon the decisions relating to the liability of sureties, or those who, by signing their names in blank upon notes not negotiable, are regarded as *quasi* sureties, this being clearly a contract of guaranty only in its form, and subject to the rules which govern that species of contract. It is clear that both the promisors in the note were solvent when it became due, and that they had abundant property liable to attachment. But the plaintiffs, with the knowledge of their delinquency, lay by nine months, during which time their property was sacrificed and all hopes of obtaining payment were by that means lost. Some intimations were made in the argument, that it was the usage of the bank where notes have been discounted, to suffer a renewal from time to time, on the payment of a certain portion of a sum loaned, as the notes should become due. It is not stated in the case agreed, that there was such a usage, or that the defendant knew of it. If at the time he gave his guaranty there was any such usage, or any stipulation to that effect, and this was known to the defendant, it may be questionable whether the want of notice would avail him in defense.

Plaintiffs nonsuit.

DIFFERENCE BETWEEN INDORSER AND GUARANTOR.—*Gibbs v. Cannon*, 11 Am. Dec. 703, and note. Accommodation indorsers as co-sureties: See note to *Daniel v. McRae*, Id. 792.

SHUMWAY v. RUTTEL.

[8 PICKERING, 443.]

SLIGHT EVIDENCE OF A DELIVERY IS SUFFICIENT to support a *bona fide* sale for value. Obtaining possession by the vendee, with the vendor's consent, before any attachment or second sale, completes the transfer, without formal delivery. Principle applied to furniture sold in a building leased to the vendee, of which he takes possession together with the vendor.

WHERE THE OWNER OF CHATTELS MIXES THEM with those of another so that they can not be distinguished, an officer will not be liable in trespass for attaching them as the property of that other.

SAME.—But if the officer sells, after notice and a demand for redelivery, he will be liable for conversion.

SAME.—If the owner exhibits to the officer a bill of sale of articles mixed with others of the same kind, so as to be indistinguishable, the officer will be justified if he selects and gives the least valuable articles corresponding with the bill of sale.

TROVER, by R. Shumway and others, for divers articles of furniture attached by the defendant, a deputy sheriff, as the property of Jacob Shumway. It appeared that the furniture formerly belonged to Jacob Shumway, and was in a tavern belonging to Eager. The furniture being attached, the plaintiffs paid off the attachment and took a bill of sale of the furniture. This transaction took place about two miles from the house containing the articles. Eager also leased this house to the plaintiffs, and R. Shumway and his family went there to live, and R. and Jacob used the furniture indiscriminately. Jacob subsequently moved away, taking the furniture with him to another tavern, where he opened a public house, having purchased some additional furniture. Here the whole of the furniture was attached by the defendant as Jacob's property. There was no other evidence of an actual or symbolical delivery of the furniture to the plaintiffs. After the attachment, the plaintiffs claimed their furniture, and showed the defendant their bill of sale. He told R. to select his furniture, but he was unable to do so. The jury found that the plaintiff went to the house after the execution of the bill of sale, intending to take possession, and did take possession of the furniture, and gave a verdict for the plaintiffs. If there was sufficient evidence of a delivery, the verdict was to stand, otherwise the plaintiffs to become nonsuit.

Merrick, for the defendant. There was not sufficient evidence of delivery of possession: *Lanfear v. Sumner*, 17 Mass. 110 [9 Am. Dec. 119]; *Lamb v. Durant*, 12 Id. 54 [7 Am. Dec. 31];

Smith v. Dennis, 6 Pick. 262 [17 Am. Dec. 368]; *Bailey v. Ogden*, 3 Johns. 399 [3 Am. Dec. 509]; *Patten v. Clark*, 5 Pick. 5 [16 Am. Dec. 365]; *Beaumont v. Crane*, 14 Mass. 400. On account of the intermingling of the goods the officer will be protected: *Bond v. Ward*, 7 Mass. 123 [5 Am. Dec. 28]; *Marshall v. Hosmer*, 4 Id. 60; *Perley v. Foster*, 9 Id. 112.

J. Davis and Allen, *contra*, cited, in regard to delivery, *Bartlett v. Williams*, 1 Pick. 288; *Rice v. Austin*, 17 Mass. 197; *Chaplin v. Rogers*, 1 East, 192; *Hodgson v. Le Bret*, 1 Campb. 233; *Anderson v. Scott*, Id. 225, note; *Codman v. Winslow*, 10 Mass. 146. And in regard to the intermingling of the articles to show that the officer was liable in trover notwithstanding, cited Buller's N. P. 35; 3 Dane's Abr. 188, 189.

By Court, PARKER, C. J. We think that the case reported furnishes competent evidence of a delivery, and sufficient to support the verdict on that point. The transfer being *bona fide* and for a valuable consideration, slight evidence of a delivery would be sufficient; as is proved by the principle adopted of a symbolical delivery; and whether there is a formal delivery or not, if the vendee obtains possession by consent of the vendor before any attachment or second sale, the transfer is complete.

In this case the vendees took a lease of the house in which the furniture was. Nothing was wanting on the former trial but evidence of an entry under the lease, to prove a delivery or possession. On this trial that defect has been supplied, so that the sale was perfect. But the vendor was allowed to repossess himself of the furniture and remove it into another house in another town and county; and to use and claim it as his own, without any contract with the vendees. This circumstance necessarily created suspicion and difficulty. Persons dealing with the vendor, who in his own name occupied a public house with this furniture in it, would naturally consider him the owner, and would probably trust him on that account. If the statute of James were in force here, there is no doubt but that the furniture would be deemed the vendor's, for he had the entire order and disposition of it. But that statute is a branch of the bankrupt system, and is not applied even in England, except in cases affected by that system. There was a similar provision in the bankrupt law of the United States. With us the possession and use of chattels by the vendor, after a perfect transfer, is only evidence of fraud, and may be explained to be consistent with the fairness of the sale.

But the difficulty of this case now as before, arises from the intermingling of the chattels sold to the plaintiff and those afterwards purchased and put into the house by the vendor. If the owner of a part can distinguish and point out to the officer what belongs to him, the officer would be a trespasser if he should take it. But he is obliged to attach the goods of the debtor, notwithstanding they may be so mixed; and it is the business of the owner, who has allowed them to be so confused, to separate his own from the debtor's. In this case, it was Jacob Shumway, the debtor, who caused the mixture; but he was placed in a situation to do this by the vendees. They do not lose their property thereby, if they can prove it. They may, after an attachment, identify their goods, give notice to the officer and demand a redelivery of them; but until they do that, the officer is not in fault, and can not be considered a trespasser.

But the question arises whether the plaintiffs shall lose their property altogether, because they were unable to distinguish it from other articles of the same description owned by the vendor. If there were a fraudulent collusion between the vendor and vendees to embarrass the sheriff and prevent him from attaching the property of the debtor, this consequence might follow; but on the supposition of an honest inability to distinguish, it would be harsh. There is nothing in the case to justify us in taking the ground that their conduct was collusive. The officer was not a trespasser in taking the goods, as he was bound to take the goods of the debtor. But could he sell them without being liable for their value? In the action of trover, proof of property and of conversion is sufficient. The proof is clear that property of the plaintiffs was taken. This taking under the circumstances may not have been a conversion. But the officer was made to know that divers of the articles were claimed by the plaintiffs, and the bill of sale was shown to him before he sold. He chose to sell the whole, having it in his power to require indemnity, and probably taking it. Finding that there were many articles of the same kind, he would have been justified under the circumstances in selecting from the whole quantity in his hands enough to correspond with the bill of sale; and if he retained the most valuable, no fault could have been found with him. He should have set aside as many articles as appeared by the bill of sale to belong to the plaintiff, and sold the residue; for he had notice of the claim, and the evidence of property was shown to

him. In the case of *Bond v. Ward* [5 Am. Dec. 28], which has been cited, it was held that no action lies against the attaching officer under such circumstances without a demand and refusal; that is, he can not be a trespasser or liable in trover without such demand. This applies to the taking. If he sells, knowing the property to be the plaintiff's, the sale is a conversion.

Judgment according to verdict.

DELIVERY TO PASS TITLE IN CHATTEL.—See *Pleasants v. Pendleton*, 18 Am. Dec. 726, and note 748.

LEFFINGWELL v. ELLIOTT.

[8 PICKERING, 455.]

THE INCORPORATION OF TENANTS IN COMMON to enable them to carry on more conveniently a common object, does not vest in the corporation a title to the land previously used by the individuals for the same purpose.

THE DEED OF A SHARE IN THE CORPORATION does not convey the tenant's interest in common; and parol evidence is not admissible to show that such was intended.

DAMAGES FOR THE BREACH OF THE COVENANT OF WARRANTY by an eviction under a paramount title, which the covenantee extinguished for a nominal sum, are measured by such sum, and an allowance for trouble and expense.

ACTION for breaches of covenants of warranty and against incumbrances. Eddy, Watson, and fourteen others, being tenants in common of seventy-five acres of land used for manufacturing purpose, were incorporated agreeably to the statute. The act made no allusion to this land, but merely authorized the corporation to hold real estate. The parcel of land in question was never conveyed to the corporation, nor vested in the corporation unless by the act of incorporation. The defendant, who conveyed to the plaintiffs by the deed declared on, derived his title by purchasing shares in the corporation and taking as vouchers certain certificates under seal in form: "This certifies that A. B. is owner of share number —, value estimated at one thousand dollars;" together with deeds of transfer, by which the corporators "give, grant, sell, and convey, and to farm let" their respective "shares." The defendant gave a fair market price for the shares, considering them to pass the seventy-five acres. If the evidence were admissible it was agreed that it could be proved that the members of the corporation and the original owners of the real estate in question, supposed that by the act of incorporation the real estate

passed to the corporation. While the plaintiffs were in possession claiming to hold in fee-simple, Eddy entered for the purpose of regaining seisin and possession thereof to the use of himself and others claiming to hold in common. The plaintiffs yielded possession, took a lease from Eddy for nine hundred and ninety-nine years, for the consideration of one cent, and purchased acquittances from others of the tenants in common of their interests. The interest of Watson passed to Newton by virtue of a sale and execution.

The cause was submitted on these facts.

Newton and Barton, for the plaintiffs, contended that the defendant took no interest in the land by his purchase of the shares: *Worthington v. Hylyer*, 4 Mass. 205; and in regard to the measure of damages cited *Sumner v. Williams*, 8 Id. 162 [5 Am. Dec. 83]; *Gore v. Brazier*, 3 Id. 523 [3 Am. Dec. 182].

J. Davis and Allen, contra, contended that the land passed by the conveyance of the shares according to the intention of the parties, and that parol evidence of this intention was admissible: *Thomas v. Thomas*, 6 T. R. 671; 3 Stark. Ev. 1021, 1026; *Doe v. Burt*, 1 T. R. 701; *Kerslake v. White*, 2 Stark. 508; *Powell v. Biddle*, 2 Dall. 70 [1 Am. Dec. 263]; *Livingston v. Ten Broeck*, 16 Johns. 1 [8 Am. Dec. 287]; *Worthington v. Hylyer*, 4 Mass. 196; *Leland v. Stone*, 10 Id. 459; *Hatch v. Hatch*, 2 Hayw. 32.

By COURT. The mere incorporation of tenants in common to enable them to carry on more conveniently a common object, does not vest in the corporation a title to the land which had been previously used by the individuals for the same purpose. The title must be conveyed by proper deeds from the individuals to the corporation. The deed of a "share" in the present case could convey to the defendant only the incorporeal right which the grantor had in the corporation. No real estate was conveyed by it; nor did it contain a description of any land. It meant to grant only what was the subject of the corporation certificate, that is, the corporate property. It is clear, then, there being no conveyance of the land in question to the corporation, and none by the individual owner to the defendant, that there was an outstanding paramount title, against which the plaintiffs have a right to be indemnified.

In regard to damages, if the plaintiffs extinguished the paramount title for a nominal sum, they were entitled to recover no more of the defendant. If they were put to trouble and expense in procuring the extinguishment, that is a proper ground

of damages. The lease for nine hundred and ninety-nine years is like an estate in fee, and it was for the benefit of the defendant to have the paramount title extinguished by a conveyance of that kind.

WOODBURY v. LONG.

[8 PICKERING, 543.]

IT WAS NOT A DELIVERY OF PEW PANELS, contracted to be made and delivered at a meeting-house in process of construction, and to be paid for in cash on delivery, to leave them at the meeting-house in the absence of the vendee from the town, and they could not be attached as the property of the latter.

A TORTIOUS TAKING OF ANOTHER'S CHATTEL is a conversion.

AN OFFICER WHO ATTACHES THE GOODS OF A STRANGER is liable in trover without demand.

TRÖVER for the panel work of sixty-six pews, which the defendant had attached as the property of John Johnson. It appeared that Johnson was under contract with the committee of a religious society for the erection of a meeting-house, he to furnish all the materials. Having proceeded with the construction of the building, he contracted with the plaintiffs for the manufacture and delivery of the pews in question. After their manufacture, Johnson proposed to the plaintiffs that if they would transport the pews to Amesbury, where the church was being built, he would give them an order on the committee, and, upon the delivery of the pews, they should receive their money. This was agreed to. The plaintiffs transported the pews to Amesbury, presented the order, which was not paid, for the alleged reason that they were not as good as Johnson agreed to furnish, whereupon the pews were piled up in the meeting-house by Johnson's carpenters, he being absent from the town. The defendant attached the pews, together with a quantity of nails in casks, and window sashes piled up at the side of the house. The defendant said, after this action was commenced, that he was indifferent how the case turned, as he was indemnified by the committee. No demand of the pews was shown. Verdict for the plaintiffs. Defendant excepted to the instructions to the jury.

Stearns, for the defendant, urged that there was no conversion without a demand; that the taking was not wrongful, it not being knowingly wrongful. He cited *Cooper v. Chitty*, 1 Burr. 81; *Solomons v. Dawes*, 1 Esp. 83; *Bond v. Ward*, 7 Mass.

127 [5 Am. Dec. 28]; *Israel v. Etheridge*, Bunb. 80; *Tukler v. Poole*, 3 Wils. 146; *Bayly v. Bunning*, 1 Lev. 173.

Hoar and Glidden, contra, cited *McCombie v. Davies*, 6 East, 538; *Baldwin v. Cole*, 6 Mod. 212.

By Court, PARKER, C. J. There is no doubt but that the property in the panels of the pews was in the plaintiffs. They were to become the property of Johnson only on delivery, and at the delivery they were to be paid for. They were transported to the place of delivery, but were not paid for or delivered, but remained, until the attachment, the property of the plaintiffs.

The attachment was a tortious act, which in itself was a conversion, according to well-settled principles of law and uniform practice. Actions against sheriffs, etc., who have attached property not belonging to the debtor, have been either trespass or trover, or replevin, as the owner might elect; trespass or replevin more frequently than trover, but the latter is quite usual. And what objection there can be to this form of action? It is more advantageous to the officer, in regard to damages, than trespass, and it is less troublesome than replevin. A dictum of Lord Mansfield, in 1 Burr. 31, is cited, which is, that if the owner brings trover, he admits that the taking was rightful, and goes only for a subsequent conversion, which must be proved by demand and refusal, or in some other way. This has not been understood to be the law, certainly not in our practice; and it is contrary to the principles laid down in the elementary books. We apprehend that the meaning of Lord Mansfield was not that a tortious taking is not a conversion, but that the plaintiff in such case, choosing to bring trover instead of trespass, will have no right to damages for the mere taking; so that if the goods were returned before the commencement of the suit, he can recover nothing, having waived his right to recover for the trespass or mere taking, by the form of his action. And this explanation reconciles cases which otherwise will be contradictory. Upon principle, as well as authority and practice, a tortious taking of another's chattel is a conversion; it is the exercise of an act of ownership, an appropriation of another's property, which is synonymous with conversion.

In 2 Esp. N. P. 580, the law is laid down thus: "When the taking of the goods has been tortious, an actual conversion to the party's own use is not necessary to maintain this action."

It would have been more correct to say, that where there has been a tortious taking, there has been a conversion. This principle is affirmed in the case of *Tinkler v. Poole*, 3 Wils. 146; S. C., 5 Burr. 2657; *Chapman v. Lamb*, 2 Str. 934.

The objection that the pew panels were so intermingled with other articles belonging to the debtor that the officer could not distinguish them, and, therefore, had a right to take them, and so is not liable to any action, is not sustained by the evidence. They were placed by themselves, and the officer took them at his peril, as in other cases.

Judgment according to the verdict.

DELIVERY OF CHATTELS.—See *Shumway v. Rutter*, *ante*, 340, and note.

OFFICER LEVYING ON STRANGER'S PROPERTY.—See *Jamison v. Hendricks*, 18 Am. Dec. 131; *Owings v. Frier*, 12 Id. 394.

COMMONWEALTH v. WING.

[9 PICKERING, 1.]

DISCHARGING A GUN at wild fowl, with knowledge and warning that the report will injuriously affect the health of a sick person in the neighborhood, and such effect is produced by the discharge, is an indictable offense.

INDICTMENT for maliciously discharging a gun whereby a woman, M. A. Gifford, was thrown into convulsions and cramps. It was alleged that the defendant knew of M. A. Gifford's weakness, and was warned and requested not to fire the gun. It was proved that M. A. Gifford was severely affected with a nervous disorder, and was uniformly thrown into a fit upon hearing a gun, thunder, or other sudden noise; and had been thus afflicted for more than six years. The defendant was on the highway, and discharged his gun two or three rods from the house in which M. A. Gifford then lived, for the purpose of killing a wild goose. The house was on a neck of land where citizens had resorted for time immemorial for the purpose of fowling. The defendant was requested by M. A. Gifford's father not to discharge his gun, and was shown to have knowledge of the effect it would likely produce on her. The defendant contended that he was engaged in lawful occupation, and as M. A. Gifford had for so long been afflicted that the disease had become incurable, he was not liable to punishment.

The jury were instructed that if the defendant knew of the probable consequences of his act, he was guilty; and they returned a verdict accordingly.

Warren, for the defendant. The indictment can not be sustained: *Bac. Abr.*, Nuisance, B; *Rex v. White*, 1 Burr. 333; *Rex v. Combrune*, 1 Wils. 301; *Rex v. Wheatly*, 2 Burr. 1126; *Rex v. Lkyd*, 4 Esp. 200; *Arnold v. Jefferson*, 3 Salk. 248. It was the duty of the woman to remove from the neighborhood where the citizens have immemorially pursued an occupation that affects her health: *Butterfield v. Forrester*, 11 East, 60; *Smith v. Smith*, 2 Pick. 621 [13 Am. Dec. 464]; *Rex v. Cross*, 2 Carr. and Payne, 483.

Morton, contra, cited 4 Bl. Com. 197; *Cole v. Fisher*, 11 Mass. 139.

By Court, PARKER, C. J. If the indictment were for a nuisance, the authorities cited by the defendant's counsel would clearly show that it could not be sustained; for the most that could be made of it would be a private nuisance, for which an action on the case only would lie. But we think the offense described is a misdemeanor, and not a nuisance. It was a wanton act of mischief, necessarily injurious to the person aggrieved, after full notice of the consequences, and a request to desist. The jury have found that the act was maliciously done.

In the case of *Cole v. Fisher*, 11 Mass. 137, Chief Justice Sewall, in delivering the opinion of the court, speaking of the discharging of guns unnecessarily, says, if it is a matter of idle sport and negligence, and still more, when the act is accompanied with purposes of wanton or deliberate mischief, the guilty party is liable, not only in a civil action, but as an offender against the public peace and security; is liable to be indicted, etc.

Now the facts proved in the case, namely, the defendant's previous knowledge that the woman was so affected by the report of a gun as to be thrown into fits, the knowledge he had that she was within hearing, the earnest request made to him not to discharge his gun, show such a disregard to the safety and even the life of the afflicted party as makes the firing a wanton and deliberate act of mischief.

Judgment on the verdict

COMMONWEALTH v. CHACE.

[9 PICKERINGS, 15.]

DOVES ARE ANIMALS FREE NATURE, and are not the subjects of larceny except when in the care and custody of the owner, as when in a pigeon-house, or when in the nest before they are able to fly.

INDICTMENT for stealing fourteen tame doves, the property of B. Williams. It was proved that Williams had dove-houses, in which he reared doves, and used them for food; that the doves mentioned in the indictment occupied these dove-houses, and were claimed by Williams as his property; that he took care of them and fed them regularly, and that they would come to be fed when called. The evidence also tended to show that the defendant shot the doves and used them for food, and that he did it *animo furandi*. The jury were instructed that if they believed that the defendant took the doves with felonious intent, they should find him guilty. Defendant excepted, on the ground that doves were not the subject of larceny. Verdict of guilty. Motion for a new trial.

Russell, for the defendant, cited *Wallis v. Mease*, 3 Binn. 546; *East's P. C.*, tit. Larceny; *Russell on Crimes*, tit. Larceny.

Morton, Attorney-general, contra, cited 4 Bl. Com. 236; 3 *Davies' Abr.* 25, 158, 161.

By Court, PARKER, C. J. It is held in all the authorities that doves are *feræ naturæ*, and as such are not subjects of larceny except when in the care and custody of the owner, as when in a dovecote or pigeon-house; or when in the nest before they are able to fly. If, when thus under the care of the owner, they are taken furtively, it is larceny.

The reason of this principle is that it is difficult to distinguish them from other fowl of the same species. They often take a flight and mix in large flocks with the doves of other persons, and are free tenants of the air, except when, impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner. Perhaps when feeding on the grounds of the proprietor, or resting on his barn or other buildings, if killed by a stranger, the owner may have trespass; and if the purpose be to consume them as food, and they are killed, or caught, or carried away from the inclosure of the owner, the act would be larceny. But in this case there is no evidence of the situation they were in when killed, whether on the flight, a mile from the grounds of the owner, or mingled with the doves of other persons, enjoying their natural liberty. Without such evidence, the act of killing them, though for the purpose of using them as food, is not felonious. Therefore a new trial is granted.

GWINNETH v. THOMPSON.

[9 PICKERING, 31.]

A TENANT IN COMMON WHO EXPENDS MONEY for the general benefit, may recover from a co-tenant his proportion of the expense, the title to the land not being in question.

ASSUMPSIT to recover the defendant's proportion of the expense of repairs done on a milldam owned and occupied by the plaintiff and defendant and one Pratt as tenants in common. Plea, the general issue. Thompson furnished the materials for the repairs, and the other two performed the work, Pratt keeping an account. Thompson paid Pratt the amount of his excess over his proportion of the expense, and in this adjustment Thompson claimed and had the benefit of the labor done by the plaintiff, in so far as they diminished the amount that Thompson was to pay to Pratt. The defendant consented to a default, subject to the opinion of this court.

Wood and Eddy, for the defendant.

W. Baylies and Beal, contra, cited *Oatfield v. Warring*, 14 Johns. 188; *Harrison v. Savotel*, 10 Id. 243 [6 Am. Dec. 337]; *Doty v. Wilson*, 14 Id. 378.

The Court said, that if a tenant in common has expended money for the general benefit, and does not bring in question the title to the land, he may recover in assumpsit of his co-tenant the sum expended by him beyond his just proportion.

ASSUMPSIT BY ONE CO-TENANT AGAINST ANOTHER.—See note to *Chambers v. Chambers*, 12 Am. Dec. 537.

TUCKER v. TOWER.

[9 PICKERING, 103.]

A TURNPIKE CORPORATION MAY MAKE ANY USE of the land on which it has an easement, necessary for the enjoyment of its franchise. It may, therefore, erect a house for its toll-gatherer, cut down trees, and dig a cellar and well for the accommodation of the house, on land over which the turnpike runs, without being liable in trespass to the owner of the land.

TRESPASS *q. c. f.* for entering on the plaintiff's land, digging pits on his soil, cutting down trees, and erecting a house on the land. The Taunton and South Boston Turnpike Corporation was authorized to erect a toll-gate within certain limits on the

road, within which limits the plaintiff's land was included. The officers of the corporation having determined to erect their toll-gate on the plaintiff's land described in the declaration, ordered the defendant to erect the gate, and to build on the plaintiff's land a suitable house for the accommodation of the toll-gatherer and his family, and to dig a cellar and level the ground so as to make it convenient. The defendant did so, and cut down certain trees that interfered with the work, laying them aside for the plaintiff's use, but the trees never came to his use. Case submitted on these facts.

Metcalf, for the plaintiff, contended that a turnpike corporation which had only an easement in the soil for the purposes of the turnpike, was not authorized to commit the acts done in the present instance: *Robbins v. Borman*, 1 Pick. 122; *Adams v. Emerson*, 6 Id. 57; *Thompson v. Proprietors of Androscoggin Bridge*, 5 Greenl. 62; *Cook v. Stearns*, 11 Mass. 533; *Herolins v. Shippam*, 5 Barn. & Cress. 221.

Richardson and Lothrop, contra.

By Court, PARKER, C. J. It is too clear to require any discussion that the proprietor of land over which a public highway has been laid retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public, or by any corporation, by authority derived constitutionally from the legislature.

By the agreed statement of facts it appears that the *locus in quo* is part of the Taunton and South Boston turnpike road, as established by act of the legislature, and that all the proceedings were had which were required by the general turnpike act to vest the franchise in the corporation created by the Stat. 1806, c. 7. The right was given to appropriate the land of the plaintiff for the purposes mentioned in the act, and he having been indemnified for this use of his property, the corporation had a right to erect their gate across the *locus in quo*, and to demand toll at that gate. We think also that they had a right to erect and maintain a toll-house at or near the gate, and within the four rods laid out for the road. It was not contemplated nor required by the legislature that the whole space should be left open for travelers, for it is specially provided that the traveling path shall not be less than twenty feet wide, leaving the rest of the space to be used for any purpose necessary to the suitable maintenance of the road. A house thereon for the residence of the toll-gatherer is certainly within the

reasonable purposes and intent of the legislature to prevent the delay to passengers, which would occur if his dwelling-house should be at a distance. No authority was given by the act to appropriate any land without the exterior side lines of the road, so that if the proprietor of the adjoining land should refuse to sell a house lot, or demand an extravagant price for it, the company or the public might be put to great inconvenience. We think, therefore, a house for this purpose may lawfully be erected on the land laid out for the road, provided the road is not thereby so straitened as that the house becomes a public nuisance; in which case a public prosecution would furnish the proper remedy. The ground taken by the plaintiff is founded upon a supposed limitation of the right of the corporation to use the surface of the land only for the purpose of travel; but we do not understand their right to be so limited, but that they may make such use of the land below the surface as may be necessary to secure and maintain the proper enjoyment of their franchise; thus, without doubt, posts may be sunk into the earth for the gate to swing upon; and such digging of the soil is justifiable as may be necessary for drains to the road. And we are of opinion also that a toll-house may be placed there, and that, if convenient, this may be made so as to accommodate the toll-gatherer with a dwelling-house; and that all things necessary for this may be also lawfully done, such as the cutting down the trees, digging a cellar, well, etc., under the restriction before mentioned, that the public highway be not too much straitened. We understand that what are called pits in the declaration are the excavations for the cellar and a well.

It is not necessary to advert to the authorities cited by the plaintiff's counsel, for they all, except one, go to establish the undeniable right in the soil in the owner of the land taken for a road, subject only to the easement taken for public use; and it is necessary to the enjoyment of this easement that there should be a toll-house, and not inconsistent with the right of property in the plaintiff that the toll-house should be so constructed as to admit of occupation by the family of the toll-gatherer. The case cited from 5 Greenleaf would be in point, if the building complained of were within the area of the road; but that does not appear. On the contrary, the presumption is that it stood without the lines.

The plaintiff must be nonsuited.

HAVEN v. FOSTER.

[9 PICKERING, 112.]

IGNORANCE OF LAW signifies ignorance of the law of one's own country, and does not extend to foreign laws or the statutes of other states.

MONEY PAID THROUGH IGNORANCE of the law of another of the United States may be recovered back.

PRINCIPLE APPLIED TO THE CASE of a niece living in Massachusetts who sold her interest in certain lands in New York left by her uncle on his death, she being ignorant that by the laws of New York lands descended *per stirpes* and not *per capita*.

INTEREST RUNS from the service of the writ, no previous demand having been made.

IN DISCHARGING A MORTGAGE, THE HEIR is entitled to the aid of the personality; but if he dispose of the mortgaged estate, without making any application for aid in redeeming it, he can not afterwards come upon the personal estate for assistance.

EXECUTORS HAVE NO POWER TO REDEEM MORTGAGES out of the state in which they are appointed.

ASSUMPSIT for money had and received, and money paid, submitted on a case stated. In 1819, Andrew Craigie, of Massachusetts, died intestate in that state, seised of lands there and in the state of New York, and leaving as heirs the wife of the plaintiff, a niece, and the defendant and two brothers, nephews. The widow took out letters of administration in this state. No letters were taken out in New York. In 1821 the plaintiff and his wife and the three Fosters sold the New York land to one Tufts for twenty-four thousand five hundred and forty dollars, he executing bonds for the purchase money payable equally to the four grantors, and secured by a mortgage on the land to them in undivided fourth parts. In 1824, the bonds were paid, one thousand eight hundred and seventy-five dollars being deducted from each of the amounts payable to the obligees, in order that Tufts might pay the sum of seven thousand five hundred dollars to one Lee, due from Craigie, and for which the lands sold to Tufts had been mortgaged as security. The contract between Craigie and Lee was for the loan progressively of fifteen thousand dollars for which said lands were mortgaged. Craigie had received four thousand nine hundred and fifty-seven dollars under the contract, and his administratrix two thousand two hundred and thirty-five dollars, which, with interest to June 15, 1820, made the seven thousand five hundred dollars. By agreement of June 17, 1820, the intended loan was reduced to seven thousand five hundred dollars. At the time Tufts undertook to pay this debt to Lee it was barred by the statute of

limitations. It had been agreed originally between the heirs and the administratrix, by reason of certain stock in the commonwealth belonging to the estate and received by the heirs, that this Lee debt should be paid out of the proceeds of the stock. But the stock remaining unsold when Tufts proposed to pay the debt, the heirs agreed to pay the same, the administratrix agreeing that the payment by them should have the same effect as if it had been made by her, there existing doubts as to the sufficiency of the personalty to pay the debts of the estate. Tufts neglected to pay Lee. He thereupon foreclosed his mortgage and obtained a decree which was satisfied out of about half of the premises. Tufts subsequently paid to the defendant the amount which he had retained to discharge Lee's debt.

Other lands in New York were sold by the plaintiff and wife and the Fosters, the consideration being divided equally. And all the times of this and the other above-mentioned transactions, the heirs were ignorant of the law of New York by which lands descended *per stirpes* and not *per capita*. This action was brought to recover the excess received by the defendant above the sum which he was entitled to under the laws of New York.

Metcalf, for the plaintiff. A foreign law is a fact, and the maxim of *ignorantia juris* does not apply: 2 Stark. Ev. 568. Interest is recoverable on the extra amount advanced to discharge Lee's debt, from the time of the advance: *Hoemer v. Barrett*, 2 Root, 156; *Shipman v. Miller*, Id. 405; *Dilworth v. Sinderling*, 1 Binn. 488 [2 Am. Dec. 469]; *Rapetie v. Emory*, 1 Dallas, 349; *Gibbs v. Bryant*, 1 Pick. 118. The defendant has received the money from Tufts as active capital: *Jones v. Williams*, 2 Call, 105; *Fox v. Wilcocks*, 1 Binn. 194 [2 Am. Dec. 433]; *Pease v. Barber*, 3 Cai. 266; *Treves v. Townsend*, 1 Cox, 50.

A. Hilliard, contra. The plaintiff's ignorance of the law was the result of gross negligence. He knew all the facts, and knew that our law makes the *lex loci rei sitæ* govern: Cod. Fabr. p. 40, def. 51, sec. 8; Id., p. 1076, def. 12, sec. 4; Id., p. 169, def. 15; Carpz. Definit. For., pt. 2, c. 28, d. 21, n. 5; 1 Domat Civ. Law, by Strah. 237, pt. 1, bk. 1.; tit. 18, sec. 1, art. 9. And under such circumstances money paid can not be recovered back: Mollenb. Thes. Jur. Civ., p. 209, n. 30; Id., p. 547, n. 82; Id., pp. 134, 237, n. 24, 546; Carpz. Definit. For., pt. 2, c. 50, d. 3, n. 5; Cod. Fabr. p. 57, def. 17, sec. 5; p. 897, def. 2, sec. 15; Calv. Jur. Lex, tom. 1, p. 713; Id., p. 565; Heinec. ad Pand., lib. 22, tit. 6, sec. 146; Struvii Syn-

tag., pt. 2, p. 300; exerc. 28, lib. 22, tit. 6, th. 59, 60; Id., p. 163; exerc. 27, lib. 22, tit. 1, th. 69. The statute of New York must be viewed as a law, and provable as a law: 2 Stark Ev. 568, 569, and notes; 1 Domat Civ. Law, 238, pt. 1, bk. 1, tit. 18, sec. 1, art. 14 and note, art. 16. Money paid in ignorance of law, in execution of a contract, can not be recovered back: 4 Tucker's Bl. Com. 27; Chit. Contr. 190; 2 Stark. Ev. 112; 2 Com. Contr. 40, 41; *Battle v. Griffin*, 4 Pick. 17; *Bilbie v. Lumley*, 2 East, 469; *Stevens v. Lynch*, 12 Id. 38; *Lundie v. Robertson*, 7 Id. 236; *Brisbane v. Dacres*, 5 Taunt. 144; *Ladd v. Kenney*, 2 N. H. 340 [9 Am. Dec. 77]. Interest from the date of the writ only is recoverable: *Lindon v. Hooper*, Cowp. 149; *Birch v. Wright*, 1 T. R. 387; *Jacobs v. Adams*, 1 Dallas, 52; *Tappenden v. Randall*, 2 Bos. & P. 467; *Dale v. Sollet*, 4 Burr. 2133.

By Court, MORRIS, J. (after stating some of the facts). By the statute of distributions of this state, these heirs, standing in the same degree of relationship to the intestate, inherited his estate in equal proportions. But by the statute of New York, which carries the doctrine of representation farther than the law of this state, or, indeed, than the civil or common law, these heirs inherited *per stirpes* and not *per capita*; so that the estate in New York descended, one half to the wife of the plaintiff, and the other half to the defendant and his two brothers, being one sixth instead of one quarter to each. Of the provisions and even existence of this statute, all the heirs were entirely ignorant during the whole of the transactions stated in the case. The plaintiff, having discovered the mistake, now seeks by this action to reclaim of the defendant one third of the amount received by him on account of the sale of the New York lands, with interest from the time of its receipt. And the question now submitted to our decision is, whether he is entitled to a repetition of the whole or any part of this amount.

Had the parties been informed of their respective rights under the laws of New York, it can not be doubted that the plaintiff would have retained one moiety of the land in that state, or would have received to himself one half of the consideration for which it was sold. The distribution of the avails of the sale was made by the heirs upon the confident though mistaken supposition that they were equally entitled to them. They acted in good faith, upon a full conviction that they were equal owners of the estate. It turned out, however, to the surprise of all of them, that they owned the estate in very un-

equal proportions, and that the defendant and his brothers had received not only the price of their own estate, but also the price of a part of the plaintiff's estate. Equity would therefore seem to require that the defendant should restore to the plaintiff the amount received for the plaintiff's estate. It was received by mistake, and but for the mistake would not have come to the defendant's hands. If the whole estate had been owned by the plaintiff, and the defendant, having no interest in it, had received the whole consideration, the equitable right of repetition would have been no stronger; it might have been more manifest.

The suggestion that the provisions of the New York statute are in themselves inequitable, is no answer to this view of the case. Whether the law of descent in that state is more or less reasonable and just than ours, it is neither our province nor desire to inquire. All statutes regulating the descent and distributions of intestate estate may be considered as positive, and, in some degree, arbitrary rules. And when a person, by inheritance or purchase, becomes lawfully seised of any estate, without fraud or fault on his part, it would be as inconsistent with sound ethics, as with sound law, to divest him of it because the rule of law by which he held it was deemed unreasonable. And if, by accident or mistake, another should get possession, it is not easy to see upon what principle he would be justified in retaining it.

In the case at bar the division of the consideration money was made by the agreement of all the parties interested. The defendant received the money with the plaintiff's consent. But it was an implied rather than express agreement. The defendant also received the money under a claim of right. The defendant believed himself to be legally and equitably entitled to one quarter part of the proceeds of the sale. And under this belief he claimed it as being rightfully due to him, and the plaintiff, under the influence of the same belief, assented to the justice of the claim, and agreed to the equal distribution which was made. It was not, however, paid to the defendant by way of compromise. No controversy existed between the parties. There was not even a difference of opinion between them in relation to their respective purporties in the estate before it was sold, or to the apportionment of the avails after the sale. There was, therefore, no room for concession on the one side or the other, and nothing between them which could be the subject of compromise.

Nor do the facts furnish any ground to presume that the plaintiff intended to grant anything to the defendant, or to yield any of his legal rights. *Nemo presumitur donare*. And we have no reason to believe that the plaintiff intended to give away any part of his own property, or his wife's inheritance. The mistake in the distribution of the consideration money, for which the land was sold, arose from the mutual ignorance of the law of descents in New York. Can this mistake be corrected, and the plaintiff be restored to the rights which he had under this statute?

It is in the first place objected, that the plaintiff's ignorance was owing to his own negligence; that he shall not be allowed to take advantage of his own laches; that what a man may learn, with proper diligence, he shall be presumed to know; and that against mistakes arising from negligence, even a court of equity will not relieve. In all civil and criminal proceedings every man is presumed to know the law of the land, and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them. But this doctrine does not apply to the present case. It was not the duty of the plaintiff to know the laws of New York, nor does ignorance of them imply negligence. Knowledge can not be imputed to the plaintiff, and it is expressly agreed that he, as well as the defendant, was entirely ignorant of the statute of New York. Besides, it was as much the duty of the defendant, as of the plaintiff, to be acquainted with the laws of New York. And if either is guilty of negligence, both are, in this respect, *in pari delicto*.

The objection that the title to real estate can not be tried in this form of action, can not avail the defendant; because it seems to us very clear, that no title is or can be drawn in question, in the present case.

The principal objection to the plaintiff's recovery, and the one most relied upon by the defendant's counsel, is, that the payment to the defendant was made through misapprehension of the law, and therefore that the money can not be reclaimed.

It is alleged that to allow the plaintiff to recover in the present action, would be to disregard the common presumption of a knowledge of the law, and to violate the wholesome and necessary maxim: *Ignorantia juris quod quisque tenetur scire neminem excusat*. This objection has been strongly urged by the defendant's counsel, and learnedly and elaborately discussed by the counsel on both sides. It is believed that all the authorities

applicable on the point, from the civil as well as the common law, has been brought before the court.

Whether money paid through ignorance of the law can be recovered back is a question much vexed and involved in no inconsiderable perplexity. We do not court the investigation of it, and, before attempting its solution, it may be well to ascertain whether it is necessary to the decision of the case before us. That a mistake in fact, is a ground of repetition, is too clear and too well settled to require argument or authority in its support. The misapprehension or ignorance of the parties to this suit, related to a statute of the state of New York. Is this, in the present question, to be considered fact or law?

The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here: 2 Stark. Ev. (Metcalf's ed.) 568; *Male v. Roberts*, 3 Esp. 163. If a foreign law is unwritten, it may be proved by parol evidence, but if written, it must be proved by documentary evidence: *Kenny v. Clarkson*, 1 Johns. 385 [3 Am. Dec. 336]; *Früh v. Sprague*, 14 Mass. 455; *Consequa v. Willings*, 1 Peters' Circ. C. R. 229. The laws of other states in the Union are in these respects foreign laws: *Baynham v. Canton*, 3 Pick. 298. The courts of this state are not presumed to know the laws of other states or foreign nations, nor can they take judicial cognizance of them till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules, and to have the same effect upon all subjects coming within their operation, as the laws of this state.

That the *lex loci rei sitæ* must govern the descent of real estate, is a principle of our law with which every one is presumed to be acquainted. But what the *lex loci* is, the court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the state of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? *Juris ignorantia est, cum jus nostram ignoramus*, and does not extend to foreign laws or the statutes of other states.

We are of opinion, that in relation to the question now before us, the statute of New York is to be considered as a fact, the ignorance of which may be ground for repetition. And whether *ignorantia legis* furnishes a similar ground of repetition, either by the civil law, the law of England, or the law of this commonwealth, it is not necessary for us to determine. The examination, comparison, and reconciliation of all the conflicting *dicta* and authorities on this much-discussed question, is a labor which we have neither leisure nor inclination to undertake.

In the view which we have taken of this case, it appears that the defendant received a part of the consideration for which the plaintiff's estate was sold; that it was received by mistake; and that this mistake was in a matter of fact. He therefore has in his hands money which *ex aquo et bono* he is bound to repay, and there is no principle of law which interposes to prevent the recovery of it out of his hands. The action for money had and received, which for its equitable properties is ever viewed with favor, is the proper remedy for its repetition. The mode in which the payment was originally secured by bond and mortgage, forms no objection to the recovery, inasmuch as the money was in fact paid before the action was commenced. The plaintiff's remedy will extend to all the money actually received by the defendant beyond his legal proportion of the estate. Whether it shall extend further, is a question involved in some difficulty. The estate in New York, at the decease of the intestate, was under mortgage. This mortgage was satisfied from the estate itself, and the amount thus paid deducted from the consideration-money. The plaintiff now contends that this incumbrance ought to have been removed by a payment from the personal estate, or if that was insufficient, from the real estate in this commonwealth.

In the consideration of this question, it must not be forgotten that the plaintiff can recover only what in equity and good conscience is due to him. What descended to the heirs in New York? The estate there, not free from all incumbrances, but with this mortgage upon it. Did equity require that the defendant and his brothers should advance three fourths of the money to pay off this mortgage, that the plaintiff might have one half the estate increased in value by this payment? The mortgagee relied entirely upon his lien on the estate; otherwise he would have demanded payment of the administratrix, and sought a remedy against her upon the personal security of the

intestate. This he omitted to do, until the claim was barred by the statute of 1791, c. 28. The only sure remedy then remaining was upon his mortgage. This remedy he resorted to, and obtained from the land mortgaged satisfaction of his debt, by a sale of part of it according to the laws of New York.

It is true, that before this claim against the estate was barred by the statute of limitations, the heirs agreed with the administratrix that the debt should be paid out of the proceeds of a sale of certain corporate stock. But the stock was not sold so as to make the payment; and after the demand was barred, the heirs made an agreement with the purchaser of their estate in New York, that he should retain enough of the consideration which was then due to them, to remove this incumbrance, deducting an equal amount from each bond. After the deduction of this amount from the bonds, the balances were paid to the obligees, and thus the bonds were satisfied and discharged. The effect of this arrangement by the heirs, was to leave the estate in the hands of the purchaser in the same situation it would have been had it been sold subject to this incumbrance. It must be presumed that the heirs stipulated to remove the incumbrance or to furnish the purchaser with the means of doing it. If this was not the case, they voluntarily agreed to relinquish a part of the purchase-money. In this event, it was equivalent to a reduction of the price of the estate, and the plaintiff can have no claim to any more than one half of the price which was finally agreed upon and actually paid.

If the heirs agreed to pay off this mortgage, it was a part of the agreement that it should be paid out of a particular fund. As this agreement was made by the plaintiff under the mistaken supposition that he owned but a quarter, when in fact he owned half of it, he claims to be relieved from its operation. If the agreement is invalid in part, it must be so in the whole. The plaintiff can not be released from it, and the defendant be bound by it. If the plaintiff, with a knowledge of his rights, would not have agreed to pay out of this fund, so the other heirs, with the same knowledge, would not have agreed to pay at all. They would have relied upon their statute bar, and left the mortgagee to his remedy on the mortgaged estate, and their grantee to his remedy against his grantors, or in resisting payment of his bonds. Although this agreement was founded in misapprehension, yet as it was made in good faith and has been executed, as the parties can not be restored to the situation they were in when it was made, and as the effect of annulling it as to one would be

manifest injustice to the other, we can see no good reason why both should not be bound by it.

Besides, we can not perceive that this arrangement by the heirs had any effect upon the rights of the mortgagee, or in fact upon his proceedings to recover his debt. The purchaser having failed to pay off the mortgage, the mortgagee was left to his only remedy, and doubtless pursued it in the same manner he would have done had the heirs made no provision for extinguishing their debt. If the heirs had received of their grantee the whole consideration, and afterwards he had been compelled to remove the incumbrance, would not the heirs have been bound to remunerate him? If at the sale they agreed to remove the incumbrance, justice would have required them so to do, and in the same equal proportions in which they had received the consideration, because if such agreement was made, it was upon the mutual belief that they were equally interested in the estate, and it would be unequal and unjust to relieve them from it.

But it is argued for the plaintiff, that he ought to recover for this part of his claim, because the estate in this commonwealth was liable for the payment of this debt, and that the neglect to pay it was a breach of duty in the administratrix, for which she would be answerable to the heirs in the same proportion in which they owned the estate. For the reasons before given, we are not satisfied that the plaintiff ought to prevail on this point, even if this position is tenable. But we think it can not be maintained as applicable to this case. The estate here was unquestionably liable for the payment of this debt, had it been prosecuted against the administratrix here before it was barred by the statute. But we do not think that it was the duty of the administratrix, under the circumstances of this case, to go into New York to redeem the estate there, nor that her omission to do it would render her liable for a *devastavit*.

By the common law the heir is entitled to the aid of the personal property of the mortgagor in paying off mortgages; but if the heir, without making application for aid in redeeming, disposes of the mortgaged estate, he can not afterwards come upon the personal estate for assistance: *Bac. Abr., Mortgage, E.* And no authority was cited, or has been found, which requires the administrator in England to redeem mortgaged estates in foreign countries. But on the contrary, it is very clear that such administrator would have no power to do any act, as such, out of the kingdom. So an executor or an administrator ap-

pointed in this state has no authority beyond its limits. He would have no power to make a tender in any other state, nor could he resort to any legal process to compel the mortgagee to accept a satisfaction of the debt or discharge the mortgage: *Goodwin v. Jones*, 8 Mass. 514; *Stevens v. Gaylord*, 11 Id. 256; *Langdon v. Potter*, Id. 313; *Cutter v. Davenport*, 1 Pick. 81 [11 Am. Dec. 149]; *Fenwick v. Sear's Adm.*, 1 Cranch, 259; *Dixon's Ex. v. Ramsay's Ex.*, 3 Cranch, 319. The law imputes negligence to no man for not doing that which he has no legal power to do. It is true, that if the mortgagee had chosen, he might not only have compelled the administratrix to pay out of the estate here, but he might voluntarily have accepted payment of her, and given her a valid discharge. But he could not have been compelled to do either. He had the power, at his own election, either to commence process upon the mortgage itself, or to take out administration in the state where the mortgaged land was, and in the one way or the other to obtain satisfaction of the debt from the estate itself. As the administratrix had not the power to prevent him from adopting either of these courses, so her omission to do it, or to attempt to do it, did not amount to waste.

The mortgage was made by the intestate to secure the payment of a note given by him for fifteen thousand dollars, about one third of which was received by him just before his death, and the residue of which was contracted to be paid by the mortgagee in a limited time. The mortgagee had a right to execute the contract by paying to the administratrix the whole balance of the fifteen thousand dollars, and increasing the lien to that amount on the estate mortgaged. But by agreement between the mortgagee and the administratrix, only a part of this sum was paid by the former to the latter, so that the incumbrance was fixed at seven thousand five hundred dollars. The plaintiff claims to recover of the defendant one twelfth part of this sum received by the administratrix, as distinguishable from the amount paid to the intestate in his life-time. This sum was paid by the administratrix in pursuance of the original agreement, was secured by the mortgage given by the intestate in his life-time, the mortgagee's only remedy was against the estate, and his action against the administratrix was as much barred by the statute in relation to this sum as the other. It was always treated as one debt by the administratrix and the heirs. All the agreements between the heirs for the extinguishment of the mortgage related as much to this part of the demand as the

other. In short, no distinction was ever made between the different sums which constituted this debt. And it was all equally an incumbrance on the New York estate. For the reasons before given, we are of opinion that there is no ground for distinguishing between the sum received by the administratrix and that received by the intestate, and that the plaintiff is not entitled to recover for any portion of the amount secured by the mortgage.

Upon a view of the whole case, it is the opinion of the court that the plaintiff recover one third of the whole amount received by the defendant on account of the sale of lands in New York, with interest from the service of the writ.

IGNORANCE OF LAW —Note to *Storrs v. Barker*, 10 Am. Dec. 323.

SALEM MILL-DAM CORPORATION v. ROPES.

[9 PICKERINGS, 187.]

SUBSCRIPTIONS FOR STOCK IN A CORPORATION can not be avoided on the ground that the published estimate of the powers and capacity of the corporation are erroneous, there being no evidence of intention to deceive those subscribing on the faith of the estimates.

ONE SUBSCRIBING ANOTHER'S NAME for shares in an incorporated company, without authority so to do, does not become a member of the corporation, but he will be liable for damages in an action on the case.

THE INSOLVENCY OF SOME OF THE SUBSCRIBERS will not deprive the corporation of its power to levy assessments, a power provided by the act to be exercised only upon the subscription for the whole amount of shares. This principle, however, may be influenced by the act of the corporation in ignoring subscriptions of the insolvent parties.

ASSUMPSIT to recover the sum of ten dollars assessed upon each share of his stock in the plaintiffs' corporation. The grounds on which the claim of the plaintiffs was resisted appear from the opinion.

A verdict was taken for the defendant, subject to the opinion of the court.

Sallonstall and Shillaber, for the defendant. The estimates of the capacity of the mill, which induced the defendant to subscribe, proved to be very erroneous. And the mutual mistake entitles the defendant to be restored to his original rights: Chit. Cont. 187, 188, 190, 273, 276; *Farrer v. Nightingal*, 2 Esp. 639; *Borrough v. Skinner*, 5 Burr. 2639; *D'Utrecht v. Melchor*, 1 Dall. 428; *Stephenson v. Scott*, Id. 425; *Judson v. Wass*, 11 Johns. 527 [6 Am.

Dec. 392]; *McFerran v. Taylor*, 3 Cranch, 270; *Stoddart v. Smith*, 5 Binn. 355; *Farnsworth v. Garrard*, 1 Campb. 38; *Chambers v. Griffith*, 1 Esp. 147; *Giles v. Edwards*, 7 T. R. 184; *Minvatt v. Wright*, 1 Wend. 355; *Cox v. Prentice*, 3 Mau. and Sel. 344. The whole number of shares was not subscribed for, a condition precedent to the levy of the assessment. Some of the shares were subscribed for by one Endicott, who had no authority therefor: *Ballou v. Taibot*, 16 Mass. 461 [8 Am. Dec. 146]; *Long v. Colburn*, 11 Id. 97 [6 Am. Dec. 160].

J. Pickering and Choate, for the plaintiff. The supposed capacity of the mill was a mere estimate, as was known to the defendant who took the risk; *Dunlap v. Waugh*, Peake, 123; *Lawrence v. Dale*, 3 Johns. Ch. 23; *Harris v. Kemble*, 1 Sim. Ch. 111. If Endicott's subscription did not bind those for whom it was made, he thereby became a subscriber: *Hastings v. Lovering*, 2 Pick. 221 [13 Am. Dec. 420]; *Sumner v. Williams*, 8 Mass. 209 [5 Am. Dec. 83]; *Randall v. Van Vechten*, 19 Johns. 63 [10 Am. Dec. 193]; *Hampton v. Speckenagle*, 9 Serg. & R. 223 [11 Am. Dec. 704]; *Mott v. Hicks*, 1 Cowen, 536 [13 Am. Dec. 550]; *Dusenbury v. Ellis*, 3 Johns. Cas. 70 [2 Am. Dec. 144]; *Sheffield v. Watson*, 3 Cai. 69; *White v. Skinner*, 13 Johns. 307 [7 Am. Dec. 381]; *Underhill v. Gibson*, 2 N. H. 356 [9 Am. Dec. 82].

By Court, PARKER, C. J. There are grounds upon which we are satisfied that this action can not be maintained, which were virtually decided in the former case between these parties; not indeed virtually only, for it is most manifest that the present action can not be sustained on the facts proved, without a direct contradiction of the principles laid down in the former case.

How is this? It was decided before, that an action would not lie upon the personal contract of the subscribers to the stock, to recover an assessment made before the whole capital was taken up, except so far as it might be necessary to raise money to defray the expenses preliminary to the complete organization of the company, which could not take place until there was a full subscription, and this, because by the act of incorporation it was made essential to the power of assessment for the general objects and purposes of the institution, that there should be a capital represented by five thousand shares of one hundred dollars each to be acted upon by the assessment. Upon revising that opinion, we are entirely satisfied it was correct.

How stands the present action? It is brought to recover the amount of an assessment made to cover the expense of materials

purchased or contracted for, to be used in carrying forward and completing the general purposes of the institution, it being agreed that the former assessment was sufficient to defray all preliminary expenses. Has, then, the whole number of shares been subscribed for, so that the capital stock amounts to the sum prescribed by the legislature in the act of corporation, as the fund to be obtained before the full power of the corporation should be exercised? It is most certain there was, at the time of this assessment, and still is, a deficit of thirty shares at least, there being no authority in Samuel Endicott to subscribe for Charles M. Endicott, or Nathan Endicott, or Timothy Endicott. With respect to the two first, the evidence is conclusive against any authority in Samuel, and with respect to Timothy, there is no evidence of authority.

It is argued that Samuel Endicott, who thus acted without authority, is himself liable to the amount of these shares; but if so, how and to what extent is he liable? He can not be made a subscriber or compelled to take shares; no certificates can be issued in his name; he can be liable only in a special action on the case, for assuming to act in behalf of his nephews without any authority from them. This can not be considered as a substitute for or equivalent to a subscription. Suppose a majority of the shares were thus subscribed for, could the corporation go on? Could the liability to an action for damages, although uncertain in their amount, constitute any part of the fund of five hundred thousand dollars established by the act? This deficiency of thirty shares in the subscription has the same effect in suspending the power of assessment, as a larger number would have; the principle is the same. In obtaining the additional subscription since the decision in the other case, this deficiency, being known, and its effect clearly deducible from the positions laid down by the court, should have been supplied.

It is not necessary to consider the legal consequence of the insolvent shares not being provided for by the new subscription. If there had been originally a full subscription, *bona fide*, the unexpected failure of some of the subscribers before or after the corporate powers were exercised, ought not to impede the operations of the company. They would assess all the shares, and take legal measures to compel the payment, and any final deficiency would be supplied by the company, by additional assessments, if necessary. But there being but little more than half the stock subscribed, including the insolvent shares, so that it became necessary, in order to enjoy the power of assess-

ment, that a further subscription should be obtained, and it being known that two hundred shares were wholly inefficient, it certainly admits of question whether these should stand as part of the fund or capital stock. These two hundred shares were treated by officers of the company as dead shares before the new subscription. At the annual meeting in 1828 they were deducted by the treasurer, in his exhibit, from the whole number subscribed, as shares on which assessments were not payable, as were also the shares subscribed for without authority. How then can they be enumerated as part of the five thousand shares? It is evident that the subscription was not full, to any legal purpose, when this assessment was made. It would have been quite as well to have set down the whole number of deficient shares to some feigned name, representing no person in actual existence. The facts affecting these delinquent shares were known to those who represented the corporation at the time of the second subscription, and at the time of the assessment.

As to the more general ground taken by the defendant's counsel, that the contract has become inoperative by reason of the supposed inability of the corporation to execute the purposes of the act, in the manner and with the benefit expected and intended by those who embarked in the project and undertook to pay for the shares they subscribed for, as it was not pretended that there was any designed misrepresentation by those who procured the subscription, we think the defense could not be sustained on this ground. If there was a disappointment in regard to the degree of benefit expected from the project, no doubt it was mutual. The defendant appears to have had as much agency in the original plan as any of the agents of the corporation. If a court of equity, with full chancery powers, might interpose to prevent the execution of a ruinous project entered into by a company, when it shall have been ascertained that the proposed advantage can not be attained, certainly as a court of law we have no such power.

As to the effect of the vote of the corporation to limit the personal liability of subscribers to one third of the prescribed amount of a share, whether for this cause the contract of the subscribers may be avoided, we do not think it necessary in this case to decide. The original subscribers had a right to expect there would be available funds to the amount of five hundred thousand dollars applicable to the purposes of the institution, if necessary to carry it into full effect, without depending

upon the value of the stock in the market; and yet it is difficult to say that the diminution of their liability by a vote of the corporation shall operate an entire discharge, particularly as this personal liability is not exacted by the act of incorporation. Believing this action well settled upon the other point, we give no opinion upon this. We are well satisfied that this assessment can not be sustained upon the principles which upheld the other, because it was not necessary for preliminary expenses; the objects and purposes of this assessment being to pay for contracts and liabilities which there was no authority to enter into and incur when they accrued.

Verdict set aside.

POTNAM, J., not sitting.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

CARSON *v.* WILSON.

(6 HALSTED, 42.)

MATTER OF JUSTIFICATION OR EXCUSE IN ACTION OF TRESPASS for breaking and entering plaintiff's house can not be given in evidence under the plea of not guilty. Such matter must be specially pleaded.

TRESPASS. In error. The opinion states the case.

Wood, for the plaintiffs in error.

Scott, for the defendant.

By Court, EWING, C. J. The declaration in this case is in trespass for breaking or entering the house of the plaintiff, and taking and carrying away his goods and chattels. The plea is not guilty. On the trial the defendants offered evidence to justify the breaking and entry and the taking of the property, under an execution from a court for the trial of small causes, in debt at the suit of one of them, placed in the hands of another of them who was a constable; and to show that the goods and chattels mentioned in the declaration were the property of one Buckelew, the defendant in the execution, and fraudulently secreted in the house of the plaintiff, and as such were levied on, and taken by virtue of the execution. The court of common pleas rejected the evidence, and a verdict and judgment were rendered for the plaintiff.

Under the plea of not guilty, the evidence offered by the defendant was inadmissible. The charge set forth in the declaration, and proved on the trial by the witnesses of the plaintiff, appeared *prima facie* to be at common law a trespass. In such case the rule of pleading requires matter of justification or ex-

cuse to be specially pleaded; and this rule has been expressly applied to an entry by virtue of process of *fiery facias*: Co Lit. 282, b, 283, a; Com. Dig., tit. Pleader, E, 15, 17; 3 Bos. & P. 223; 1 Saund. 298, n. 1; 1 Chit. Pl. 492, 495; 2 Id. 587, and note g

The evidence offered by the defendants was, therefore, properly overruled, and the judgment should be affirmed.

Judgment affirmed.

LIDDEL v. McVICKAR.

[6 HALSTED, 44.]

CORRECTION OF MISTAKE IN ADMINISTRATOR'S ACCOUNT.—Where an omission has by mistake been made in an administrator's account, on a sufficient showing made to the court, the omission may be supplied and the mistake corrected in his subsequent or final account.

ITEMS OF ACCOUNT IN ORPHANS' COURT may be expressed in general terms. **ORPHANS' COURT MAY ALLOW ADMINISTRATOR INTEREST** on sums advanced by him, in good faith, to the estate, especially if such advances were beneficial to the estate.

A SECOND ORDER OF SALE OF REAL ESTATE MAY BE MADE by the orphans' court, when the estate sold under the first order proved to be insufficient to pay all the debts of the estate.

ORDER OF SALE OF REAL ESTATE may be made to pay money advanced by the administrator, in good faith, for the payment of the debts of the estate.

TIME WITHIN WHICH ORDER FOR SALE OF REAL ESTATE MUST BE APPLIED FOR by the administrator is not fixed by law; it is left to the discretion of the orphans' court, and is to be determined by the circumstances of the particular case.

QUESTIONS OF TITLE TO REAL ESTATE can not be passed upon by orphans' court.

WHERE THE ADMINISTRATOR HAS SOLD THE PART OF THE REAL ESTATE to which he was entitled as one of the heirs, the orphans' court should not order the part so conveyed by him to be sold for payment of a debt due to him for advances made to the estate.

EXPENSES OF JUDGES CAN NOT BE ALLOWED BY ORPHANS' COURT, beyond what the statute allows; but the court may allow reasonable counsel fees.

CERTIORARI to the orphans' court of Morris county. The opinion states the case.

Frelinghuysen and Vanarsdale, for the plaintiff.

Vroom, for the defendant.

By Court, EWING, C. J. The defendant in certiorari, William McVickar, as administrator of Archibald McVickar, deceased, exhibited in the year 1807, in the orphans' court of the county

of Morris, an account of his administration, and obtained an order for the sale of certain parts of the real estate of the decedent, for the payment of debts, for which the personal estate appeared to the court to be insufficient. Under this order he made sale of four of the five parcels of land which he was authorized to sell, leaving the fifth parcel unsold. In December, 1825, the administrator exhibited a further account of his administration, showing the amount of sales and the disposal of the moneys arising therefrom, alleging a subsisting deficiency of means to satisfy the debts of the estate, and praying another order for the sale of the other real estate left by the decedent. Against this account, and the application for an order of sale, exceptions were made by one of the children and heirs at law of the deceased. After a hearing in July term, 1826, a settlement of the account was made, a decree was passed for its allowance, and certain real estate was ordered by the court to be sold for the purpose of paying the balance which, according to the account, appeared to be due. The account of July, 1826, and the order for sale, having been brought here by certiorari, a number of reasons have been assigned for setting them aside.

The first reason is, "that the said orphans' court, in the said final account, allowed and decreed sundry items alleged to be paid by the said administrator prior to March term, 1807, of said orphans' court, when his account was stated, and not included in that account."

This objection is raised on the broad position that no item omitted in the former account, no credit or matter of discharge, however just, which existed at the time the first and partial account was exhibited and passed, and which was not therein included and allowed, can be made the subject of credit or allowance in the subsequent account. This position, in its full extent, is not sound. If, by mistake, or other just and sufficient cause shown to the court, an omission has taken place in an account thus exhibited, especially an account appearing on the face of it to be partial and not final, such omission may be corrected, and just allowance made to the administrator in his subsequent or final account. It is true the court, when called on to make such allowance, may and ought to require strong circumstances to excuse and explain the omission; but such circumstances being proved, the justness of the demand and the reasons that no previous claim was made having been satisfactorily shown, the court are not restrained by any rule or

law or equity, or by any sound principle relative to matters of account, from introducing and allowing the omitted items. On the contrary, they are bound to do so. Even a final account is subject to correction, when mistake is proved to the satisfaction of the orphans' court: Rev. Laws, 787, section 32. I do not mean to say that that section applies to the present case, but refer to it simply as a leading as well as just principle. The very cases cited on the argument by the counsel of the plaintiff, while they show a proper disposition in the courts not to intermeddle with or disturb stated or settled accounts, carefully recognize the power so to do when "something strong," or "specific errors" are "distinctly charged" and "proved as specified." In *Perkins v. Hart*, 11 Wheat. 256, Judge Washington, delivering the opinion of the supreme court of the United States, says: "It surely can not be contended that the settlement and discharge of an account for money lent and advanced for the use of the testator is a bar to a claim for commissions, or of any other demand not included in the settled account." Again, "The rule is the same in principle at law. A settled account is only *prima facie* evidence of its correctness. It may be impeached by proof of unfairness or mistake in law or in fact." And again, "The legal conclusion, therefore, insisted on by the defendant, that the plaintiff is precluded from recovering in this action for the two items claimed to have been due before the two accounts spoken of were rendered, is not correctly drawn, unless it appeared that those two items were included in what is called the account stated." The particular grounds on which, in the present case, the allowance of these controverted items was made by the court are not exhibited on the account nor in the evidence laid before us. According to the doctrine in *The State v. Mayhew*, 4 Hals. 79, "the decree is presumed right until the contrary appears, either from the face of the decree or by such matter *dehors* the record as may be the proper subject of examination."

2. The second reason is, "that the orphans' court allowed the said administrator and decreed sundry sums of money without setting forth for or on what account the same were paid, and also sundry sums of money for which no receipts were produced, without setting forth when paid, to whom, or for what."

To the first branch of this reason an answer is found in the ancient practice of the orphans' courts, long sanctioned by use, experience, and convenience. The items of account are almost necessarily expressed in very general terms. A statement if

brief would furnish no useful information, and if minute and in detail would swell the account to an enormous, and at the same time useless and unprofitable bulk. Before the account can be passed or sanctioned by the court, all who are interested have the opportunity to examine it; and if suitable explanation is withheld or unsuccessfully sought, an exception to the account will require the accountant to sustain it by vouchers and proofs. In respect to the want of receipts, the fact on which the question is raised is not made out. It is not shown that any item in the final account was allowed without the production of a receipt or other proper proof of its payment. On careful scrutiny, I am unable to find any room for even an inference or presumption that any such allowance was made by the court. No one was particularly designated by the counsel on the argument.

3. The third reason is, "that the orphans' court allowed to the said administrator and decreed sundry sums of money for interest on money paid by the said administrator, for and on account of the estate of the said deceased."

The payment of the principal sums by the administrator, and the propriety of charging them in the account, are not, as will be observed, drawn into question. The interest only is the subject of objection. There is no rule of law or principle of equity sanctioned or adopted in our country, which unqualifiedly and under all circumstances denies interest to an executor or administrator upon moneys actually and in good faith advanced for the use of the estate. The cases cited by the the plaintiff's counsel do not establish such a general rule: *Storer v. Storer*, 9 Mass. 37, is very shortly reported, and the facts under which the charge of interest was claimed and rejected are not detailed. The court disallowed it, observing it was always in the power of an administrator to put himself in cash from the estate. Where such is the truth, the charge is doubtless improper; but the proposition appears to me to be stated with too much latitude. Instances often occur in which an administrator can not put himself at his pleasure in cash, even by a sacrifice of the property; and oftentimes an advance by him is highly beneficial to the true interests of the estate. The case of *Haviland v. Bowerbank*, 1 Camp. 52,¹ furnishes no rule for the present occasion. The subject under consideration was different. Interest on moneys received, not on moneys advanced. Lord Ellenborough was seeking, as he says, to establish some fixed rule where the determinations had been extremely capricious; and he laid

1. *De Haviland v. Bowerbank*, 1 Camp. 52.

down what he supposed the safe rule, at the same time admitting he had seen a suggestion to the contrary elsewhere. A charge of interest by an administrator will properly be viewed with caution, and the circumstances offered to sustain it will be examined with scrupulous care; but circumstances may exist which will not barely justify, but commend an advance of money by the administrator, and entitle him to an allowance of interest. Whether or not such circumstances did actually exist in the present case, the orphans' court had much better means to decide than we possess.

We can see no legal principle which has been violated by the determination they have made. On the contrary, it appears to have been called for by the proofs exhibited before them, so far as we have a view of them in the accounts and documents submitted to our examination. The personal estate early proved inadequate. A sale of part of the real estate was made, and the proceeds applied towards the discharge of the debts. The sale of the residue of the real estate was postponed as the judgment of the orphans' court say, in the reasons given by them for their opinions, and which are made a part of the state of the case submitted to us, not "by any contrivance of the administrator for his own benefit, but by the particular circumstances of the estate; by the express consent of some of the heirs-at-law, after taking advice of counsel, and by the assent of all of them." In the mean time, however, the debts of the estate were in some way to be paid. One of the creditors, and he the largest, was pressing for his money, and about it the family was concerned, and especially the plaintiff in certiorari, and desirous to conceal it from her mother, which could only be done by preventing measures from being taken against the farm on which she lived, and to a portion of the profits of which she was entitled. The administrator may, therefore, well have been, as Jacob Rush testified, the plaintiff, and others of the family used frequently to say, he was "puzzled in settling the estate." Under these circumstances, the administrator discharged the claims on the estate by the advance of his own moneys, or otherwise from his own resources; and in all respects acted, as the orphans' court say was satisfactorily proved to them, "in good faith." Had these debts remained unpaid, an arrearage of interest must have accrued upon them in favor of the creditors. In *Jones v. Williams*, 2 Call. 102, an executor was allowed interest on a balance due him on the administration account. In *Darrel v. Eden*, 3 Desau. 243 [4 Am. Dec. 613], Chancellor Desaussure, said: "It

is the course of the court to allow interest on executors' accounts, in their favor, when they appear to have been in advance for the estate."

I can not see, then, any rule of law or principle of justice, which has been violated by the allowance of interest made by the orphans' court. In the amount, however, of the interest allowed, or in other words, in the time up to which the calculation was extended, I think the court erred. All obstacle to the settlement of the estate was removed on the decease of the widow McVickar. The administrator should have then promptly proceeded. He had a decree remaining unexecuted for the sale of a certain portion of the real estate, and he might at once have made application for further sales if necessary. If he had promptly proceeded he might perhaps have been entitled to carry on the interest until the sales had placed him in funds. But he stood still when he might have advanced; and the interest ought not to be allowed to accumulate during a single hour of inexcusable neglect or delay. The orphans' court allowed him one year's interest from the decease of the widow, and this one year's interest I deem an erroneous excess.

4. The fourth reason assigned, is: "That the court decreed an allowance to the said administrator of a bond of the deceased to Abraham Cooper, taken up and paid at different times, or assumed to be paid; and because the said court allowed the interest on the said bond."

The facts, that this bond was given by the deceased, was a just demand against him, and was paid by the administrator, are not questioned. The payment is alleged in the account, and no evidence is offered here, even if it were admissible, to show the account incorrect in point of fact. What has already been said on the topic of interest in general is in a great measure applicable here and need not be repeated. More than the amount of the penalty does not appear to have been paid by the administrator; and the circumstances of the case fairly bring it within the exceptions to the general rule admitted to exist even by those authorities which, as a general rule, limit the recovery of interest to the amount of the penalty.

5 and 6. The fifth and sixth reasons were waived upon the argument.

7. The seventh reason is: "That in 1807 the court granted the administrator an order to sell five tracts of land; that four only had been sold; and nothing appears to show that the fifth

tract, remaining unsold, is insufficient to raise the sum requisite for the payment of the debts."

On the other hand there is nothing to show that the fifth tract is sufficient for the purpose. The act of the legislature directs the orphans' court to order the sale of so much of the real estate as will be sufficient for the payment of the debts. In the present case the court have ordered the sale of other real estate besides the fifth lot, of the whole farm whereof that lot is a parcel. As it is the duty of the court to ascertain and decide whether a sale of the whole is necessary, or whether the sale of part will suffice, we are bound to presume, in the absence of any proof to the contrary, that the sale of a part was insufficient for the required purpose, and the whole was necessary. Perhaps, indeed, on certiorari, we are precluded from any inquiry into the facts decided by the orphans' court, and concluded in that respect by their determination.

8. The eighth reason is: "That the orphans' court could not make the second order for sale, because the first order remained unexecuted." The residue of this eighth reason as filed, not having been urged on the argument, needs not to be adverted to.

Assuming that the court had authority to make a second order for sale, which is to be examined under another head, the fact that the first order remained in part unexecuted formed no legal barrier to the exercise of this authority. The proper inquiry was in respect to the adequacy of the first order to the exigency of the case. Was the part thereby directed to be sold sufficient for the payment of the debts? If not, to avoid hurtful delay would alone have been a sufficient motive for promptly making the second order. And a higher motive would probably be afforded by the prospect of more advantageously selling the farm entire than in detached parcels. These were matters about which the court were bound to inquire, and, according to the result, to regulate their conduct.

The doctrine maintained by the counsel for the plaintiff under this head is, that in respect to the real estate of a decedent the orphans' court can make but one order or decree for sale. One order being made, all power or authority of the court, they say, ceases. There is nothing in the act of the legislature which so circumscribes the power of the court, which either directly or indirectly imposes this limitation; and every motive of expedience and convenience forbids so rigorous a construction. In the letter of the act there is not, it must be admitted, any lim-

itation of the authority of the court to a single order. Nor is there any in the spirit of the act. The whole, if necessary, of the lands, tenements, hereditaments, and real estate of the testator or intestate are placed under the power of the court for the payment of the debts. The power, then, is not exhausted until, on the one hand, the whole estate is disposed of, or, on the other, all the debts are satisfied. The only anxiety in the legislature seems to have been that no more of the lands should be sold than the payment of the debts would require; that part only should be sold if part would suffice; but their intention is equally clear that the whole should be used if a smaller portion would not subserve the end in view. A prudent and discreet execution of the duty confided to the orphans' court may often render a second order of sale indispensable for the final settlement of the estate. The evident policy of the statute is to sell no more of the real estate than is strictly necessary. No more shall be sold, says the twenty-fourth section, than shall be necessary to pay the residue of the debts. Governed by this policy, the court are to order a part only, and to specify the part when, in their judgment, the sale of part will suffice. Now it often may happen, and it often has happened, that the part thus specified produces at public vendue much less than was anticipated. The expectations of the court and of those interested in the estate are disappointed. A portion of the debts yet remain unsatisfied. When the object of the legislature is so plain, when the power of the court over the whole real estate is so clear, very explicit words or very palpable intent should be shown to justify a construction which precludes any further act on the part of the court. The present case bears no analogy to those cases where a special power being given to a court or officer has once been executed in its whole extent, and can not therefore be subject to the same rules. Such were the cases cited on the argument by the plaintiff's counsel. In *The State v. Conover*, 2 Hals. 218, upon certiorari, in matter of road, the court of common pleas of the county of Monmouth had, in April term, 1822, on the return of the surveyors, appointed freeholders for review; in July term, 1822, upon the return of their certificate, had set aside their appointment as incautiously made; in October term, 1822, had appointed six other freeholders; upon whose certificate coming in at a subsequent term, they caused the return to be recorded. The record of the return was vacated here. One of the members of this court was of opinion that the appointment of free-

holders at October term, 1822, was irregular; the statute having directed the appointment to be made during the term next succeeding the entry of the caveat, an appointment at a subsequent term was without authority. Another concurred in setting aside the proceedings, but on a different ground, expressing no opinion on this head. And the other thought the proceeding was sufficiently regular. In *Thatcher v. Powell*, 6 Wheat. 119, which arose on a sale by a sheriff under an order of court made by virtue of the laws of Tennessee, for the payment of taxes, there was no second order or second sale. The case of *Wheeler v. Wheeler*, 1 Conn. 51, bears much more analogy to the topic under examination than either of the cases cited at the bar. A decree of the court of probate, ordering a sale of real estate for the payment of debts, having been set aside on appeal, a subsequent decree was made for the same purpose, and was affirmed on appeal in the superior court, and afterwards in the supreme court of errors.

10. The tenth reason is: "That the said orphans' court made the said order to sell the said homestead farm, wholly or partly, to pay the balance due to the said administrator, whereas the said court have authority only to sell to pay the debts of the said deceased; and because there were no debts of the deceased to pay."

As already mentioned, the avails of the personal estate, and of the real estate, sold under the first order, were insufficient to discharge the debts. The residue was satisfied by the administrator to the creditors, either by his personal responsibility, or by actual payments out of his own funds. The reality of the debts, and their payment by the administrator, are not indeed controverted, either in the reasons filed or upon the argument at the bar. The fact is abundantly shown, not only by the account as stated under the direction of the orphans' court, but in the abstract of the evidence which has been submitted to us. One of the witnesses testified that in the old lady's life-time, they, the plaintiff in certiorari, and others of the heirs, used to talk of the administrator having a claim upon the estate after the old lady's death for his paying money. Another testified that Duncan McVickar said, when an attempt was made to settle in November preceding the exhibition of the account to the surrogate, "that he thought interest should be cast only up to his mother's death." "It was not denied that the account was correct. The amount was only more than was expected." He farther testified that George

Forsyth, acting for the plaintiff, and Duncan McVickar, stated the account, and rejecting all the interest, made a balance due the administrator of five or six hundred dollars. He farther testified that in 1820 or 1821, the plaintiff told him, "she thought the administrator had a pretty heavy demand against the estate; she did not know how he came to be so much in debt if he had not." Another witness testified: "Duncan McVickar told him he expected Williams, the administrator, had a claim against the estate, and that he embarrassed himself to pay the debts of the estate." Moreover, the judges of the orphans' court, in their reasons, say: "It was satisfactorily proved they were debts which the deceased honestly owed, and which were paid by the administrator in good faith."

Now, whether these debts remained due to the several creditors, or whether they were paid to the creditors by the administrator from his own funds, they were still in truth and substance the debts of the estate. To replace the moneys which the administrator advanced, would still be to pay the debts of the estate. Whether the sale was made to put him in funds to discharge the debts, or to reimburse him what he had actually paid, the object was the same, the payment of the debts; the limit was the same, the amount of the debts; and if good faith was preserved by the administrator, the effect on the estate and on the interests of those concerned was precisely the same. The watchful eye of the court should overlook the conduct of the administrator, perhaps even with jealousy, when he claimed to have made advances, but if his motives were pure, and the advances actually made in good faith, and under circumstances reasonable and prudent, a discharge of the debts by him to the creditors could work no such extraordinary change as to preclude the application of the estate to the same end, though in different hands, to which the policy of the law had subjected it. In *Livingston v. Newkirk*, 3 Johns. Ch. 318, Chancellor Kent said: "If the personal assets prove deficient, and the executor pays out of his own money to the value of the land, and the court of chancery should direct the land to be sold, it would certainly allow the executor to retain for his own indemnity." In *Murray v. Rottenham*,¹ 6 Johns. Ch. 62, the same chancellor held that a trustee, who had paid off incumbrances on the estate with his own money, might look to the estate in the first instance for reimbursement. In *Wheeler v. Wheeler*, 1 Conn. 51, a decree of the court of probate for the sale of real estate to

1. *Murray v. De Rottenham*,.

pay debts, was made in the year 1800; the sale took place; and the creditors were paid in full, and gave receipts. On appeal, the order under which the sale had been made, was afterwards set aside. In the year 1812, on another application, another order for sale for the payment of the debts was made; and having been affirmed on appeal by the superior court, was brought by writ of error to the supreme court of errors, where one of the reasons assigned for reversal was that the debts against the estate having been paid, there was no authority in the court of probate to order a sale of land. Smith, J., in delivering the unanimous opinion of the court, said: "If it were admitted that there were now no debts due to the former creditors, and that the moneys formerly paid them could not be recovered back, it would follow that the administrator would become the creditor, and the land ought to be sold to pay him."

In *Pea v. Waggoner*, 5 Hayw. 242, a bill was filed by an administrator stating payment of debts justly due from the intestate exceeding his personal estate, and praying sale of land for satisfaction of the debts he had thus paid beyond the personal assets. The defendants, heirs, demurred, and insisted that the complainant had not paid at their request, and therefore could not have any demand against them; he could not have been compelled to pay beyond the assets, and his voluntary payments to a greater amount ought not to turn him into a creditor against the real estate. The court overruled the demurrer, and said: "Had not the complainant paid these surplus debts, the defendants would be liable for them, and there is no injustice in saying he shall stand in the place of the creditors, and resort to that property for satisfaction which they would have resorted to; and being debts justly due from the intestate, his lands were liable to satisfaction for them."

In *Ex parte Allen*, 15 Mass. 58, an application for the sale of real estate to reimburse the executor who had paid beyond the amount of the personal estate, was refused, because, among other things, it would serve to defeat titles made by the petitioner himself in the full exercise of his judgment, and without any influence; but no doubt was raised of the power of the court to order a sale for such purpose; indeed, the power seems to be recognized by the court. In the cases cited by the counsel of the plaintiff in *certiorari*, I do not find either precedent or principle to sustain this reason. Their industry and research, which I need not here either mention or applaud, have furnished no case where, on such ground, an order has been

refused or repayment denied to an executor or administrator. The cases they cited respect constables and sheriffs, and rest on very different principles.

In *Wooley v. Disberry*, 1 Penn. 383;¹ in *Harris v. Champion*, 1 South. 153, and in divers other cases, it was held that a constable having an execution against a defendant, can not, without his request, pay off the demand and then maintain an action at law to recover of the defendant the amount thus paid. If paid at his request, the action may be maintained. Between these cases and that of an administrator honestly and in good faith advancing moneys, when not in funds, to discharge debts of the estate, the difference is too wide and obvious to need illustration.

The cases of *Reed v. Pruyn*, 7 Johns. 426 [5 Am. Dec. 287], and *Sherman v. Boyce*, 15 Id. 443, were cited to prove that a sheriff can not himself pay a plaintiff the amount of an execution, and afterwards proceed to reimburse himself by a sale of the property of the defendant. It is not necessary to examine how far these cases support this broad position. In both, the conclusion of the court was rested on the liability to abuse, and the danger of oppression. In the latter case, the court said, "to allow any man to wield the process of our courts in his own favor, in order to exact such a measure of justice as he may think due to himself, would not only lead to oppression and abuse, but would tend to subvert the foundation of private rights and of civil liberty." But however proper and sound this doctrine may be when applied to sheriffs, the very ground and reason of it is wanting in the case of an administrator. He is not to wield the power of sale in his own favor. He is not to exact such a measure of justice as he may think due to himself. Unlike the sheriff, between whom and the sale no impartial tribunal interposes, before the administrator can sell, he must ask the aid of a watchful court who will scrupulously examine his conduct, ascertain the existence of the debts, inquire into his advances, and the reason for them, restrain the amount of sales according to their judgment, direct what he shall sell, and control him in almost every efficient step.

In this reason, then, I do not find any ground to disturb the decree for sale.

11. The eleventh reason is, "that it appears by the accounts of the said administrator that all, or nearly all, the debts of the

1. *Wooley v. Disberry*, 1 Pennington, 383.

deceased, and claims of the said administrator, are barred by the statute of limitations."

It does not appear that these debts, or any of them, were barred at the time they were paid by the administrator. So far as respects the original creditors, then, there is no ground for this objection. Whether the lapse of time can prevail against the administrator, will depend on the question, now to be examined, whether the present order for sale was applied for within reasonable and legal time, and the delay has been satisfactorily accounted for.

12. The twelfth reason brings this subject before us. It is, "that the order for sale was not applied for within a reasonable time after the death of the said Archibald McVickar."

There is no limitation expressly made, no period expressly fixed by the legislature within which the order for sale should be applied for or made. Reflection and experience both teach the extreme difficulty of prescribing any fixed rule which would, in general, operate safely and justly. This lesson is more impressively taught by the very wide conclusions to which enlightened courts have been led. Thus in *Mooers v. White*, 6 Johns. Ch. 378, Chancellor Kent inclined to think that in ordinary cases, the executor or administrator ought to make his application within one year after he has entered on the duties of his office. While in *Ricard v. Williams*, 7 Wheat. 119, Justice Story, for himself, and the other justices of the supreme court of the United States, says, the reasonable time within which the power should be exercised, ought to be limited to the same period which regulates rights of entry: fifteen years in the state of which he was speaking. And in *Gore v. Brasier*, 3 Mass. 542 [3 Am. Dec. 182], Chief Justice Parsons deemed, in an analogous case, twenty years to be a suitable period. Our statute directs the application to be made "as soon as conveniently may be." A discretion is very properly, as it is very necessarily, confided to the orphans' court. Each case must, in some measure, depend on its own peculiar circumstances. A convenient time for one would for another be very inconvenient. The time reasonable, according to the situation of one estate, would, in another, be very unreasonable.

This doctrine is fully recognized by Chancellor Kent, even with the rigid rule he thought ought to be imposed on the executor or administrator. In the case above referred to, after stating what in common cases he deemed a reasonable time, he admits of subsequent applications under peculiar circumstances,

and with some reasonable cause for delay. And in another place he says: "The judge of probates or surrogate must be entitled to determine, in sound discretion, what is a reasonable time under the circumstances of the case. If he, the executor or administrator, has been guilty of gross negligence, or palpable laches on these points, he is clearly not within the meaning of these acts." In the present case I am strongly inclined to the opinion that we are concluded on this subject by the determination of the orphans' court. Sitting here to review matters of law, not of fact, having very little concern with matters of mere discretion, I hesitate on the propriety of our interference, unless we discern the violation of some rule of law. Upon looking, however, into the circumstances of this case, I can not say there has not been reasonable cause for delay, or that the administrator has been guilty of gross negligence or palpable laches. The farm, at the decease of the intestate, was subject to a charge placed on it by the will of his father, under which he held it. One room of the house, such as she chose, was given to his widow during her life. One of the upper rooms was given to his daughter Margaret, the present plaintiff, during her widowhood. The stock he bequeathed his widow; two cows, six sheep, and a mare and colt, were to be maintained by his son Archibald, both winter and summer, for her, upon the farm; and she was, moreover, to have one third of the profits arising from the farm during her life-time.

It is not necessary to say whether the farm could at all be sold before her decease. Unless subject to the charge, no one will pretend that it could be sold; and subject thereto, if any one could be found to purchase, it must surely have been at a very low price. This charge bore no resemblance to a mortgage, to which it was likened on the argument. "One third of the profits arising from the farm," is the language of the will. The amount could, by no process of calculation *a priori*, be ascertained. How long the widow might live—and she did live after Archibald's death for twenty years—and how long the plaintiff might remain a widow and retain her room—and she is yet a widow—could not be foretold. How hazardous a speculation, then, must a purchaser have made! Who would have bid except a price proportioned to such hazard? Nor, I apprehend, could the administrator have sold off a part and left sufficient to satisfy the widow, as was supposed on the argument; for, of the profits arising from the whole farm, she was, according to the will, to have a share. Among the heirs of Archibald Mc-

Vickar, but one opinion seems to have been entertained. It is true no formal meeting was held and instructions given to the administrator not to attempt a sale. But the opinion of all seems to have been that a sale could not, or ought not, to have been made. The husbands of two of the heirs told one of the witnesses at an early period, that they had consulted counsel, and were advised that nothing could be done with the place during the old lady's life-time. The plaintiff, in *certiorari* herself, told one of the witnesses that nothing could be done with the place until the old lady's death. These were all the heirs, except Duncan, who had been removed out of the state a number of years before the decease of his brother, the intestate.

Under the consequences, flowing from all these circumstances, the conclusion of the orphans' court seems a very sound one, that the administrator acted in perfect good faith, and especially when we see him, instead of selling the estate at all hazard, for whatever it might produce, and at any sacrifice, laboring to serve the interest of the heirs; exerting himself to provide for the debts out of his own resources; "embarrassing himself to pay the debts," as one of the heirs said; and, in the language of another, "puzzling himself to settle the estate." In inquiring into the effect of the lapse of time, it should also be remembered that the whole real property remained in the hands of the heirs. Some transfers had been made among themselves, which will hereafter be noticed; but no part had passed from them into the hands of strangers.

13. The thirteenth reason is, "that the order to sell the homestead farm includes lands of the deceased, sold before the said order or decree was made by certain of the heirs to Margaret Liddel, the plaintiff."

From the deeds laid before us, it appears that John Vantuyt, and Isabel, his wife, who was one of the heirs of the deceased, sold and conveyed, on the tenth of June, 1825, her supposed share by inheritance, or one fifth part, to Margaret Liddel, in consideration of three hundred and fifty-three dollars, with covenants of seisin, power to convey, freedom from incumbrances, and general warranty. On the ninth of November, 1825, Duncan McVickar sold and conveyed to Margaret Liddel, for six hundred and forty dollars, two seventh parts, his supposed share, with a special covenant that he had done no act whereby to change, alter, or defeat the title. By two deeds, one of them dated seventh of September, 1824, and the other on the ninth of September, 1825. in consideration of four

hundred and eight dollars and sixty-four cents, William McVickar, the administrator, sold and conveyed to the said Margaret Liddel, two seventh parts of the farm; the former deed containing the same covenants as in the deed of Vantuyt; the latter a similar covenant to that in the deed of Duncan McVickar.

This reason rests upon the basis that the conveyances by the heirs passed a valid title to their alienees; for otherwise no conclusion could be drawn that the conveyances ought in any wise to impede the making by the orphans' court of the solicited order. A question of title is then necessarily raised by this exception before that court. Now, it is clear, that court has no power or authority to hold plea of title, or to decide on the nature, validity, or effect of conveyances. It is moreover clear that an order of the orphans' court, and even a sale under it, would not destroy or disturb those conveyances, if legally made, or, in other words, if the heirs had right so to convey as to preclude a subsequent sale under the authority of the orphans' court. In such case, if that court had entered into the question of title, and pronounced the conveyances invalid, and made an order for sale, the title to the grantees would not, from want of jurisdiction in the orphans' court, have been by such determination and decree destroyed. The result is that the grantees in those conveyances are left without prejudice to stand on their legal and equitable rights. And if, by reason of their validity, the shares of other heirs be sold to pay the debts of the intestate, such heir or heirs will be entitled, under the provisions of the act of the legislature, to call for contribution.

These remarks apply to the conveyances of Vantuyt and wife, and Duncan McVickar. The sale and conveyance made by the administrator himself present different considerations. The propriety of granting him an order for the sale of the share already sold by him, or of including that share in the order for sale, does not turn on the question of title. This sale was made by him after he had discharged the debts of the estate, and thereby placed himself in the stead of the creditors, so that whatever afterwards was to be raised and paid out of the estate, was in truth to be paid to him. As heir, he sold this share of the real estate. He thereby became answerable to the creditors to the value of the lands thus sold: Rev. Laws, 291, sec. 2. But he is himself the creditor. Being, then, the hand both to pay and to receive, the portion of the debt which this share of the land might otherwise be chargeable with, ought to be deemed

extinguished, and an order ought not to be granted to him for the sale of it. If his original sale is valid, and would prevail against a sale made under an order of the orphans' court, if such order were now granted, no injustice whatever is done to him in refusing him such order, as it would avail him nothing; and as he has already raised by sale in another capacity, whatever the land should be charged with; and the amount, having been received by him, is already in the place where it ought to go if a sale were now to be made. If the original sale was not valid, but would be overruled by a sale under the order of the orphans' court, to refuse such order is to prevent the gross injustice which would be wrought by enabling him, by a second sale, to place the value a second time in his own purse. In the case *Ex parte Allen*, already cited, the sale of real estate to reimburse the executor who had paid beyond the amount of the personal estate, was refused, among other reasons, because it would serve to defeat titles made by him in the full exercise of his judgment and without any influence.

It appears to me, therefore, that the orphans' court should not have included this share of land in the order for sale, and should not have authorized the administrator to raise, by sale, the proportionate part of the amount of debts remaining unsatisfied.

14. The fourteenth reason is, "that the court allowed, besides the charge of court and surrogates' fees, on the settlement of the account, seventy-five dollars for the expenses of the five judges for six days, and the counsel fees which were paid by the administrator to his counsel."

In the former of these allowances, I think the court erred. The expenses of the judges is utterly indefensible. Not a shadow of support for it can be found in any act of the legislature. I am aware that in some parts of the state instances have occurred, and perhaps for a long time, in which, at special courts, the expenses of the judges or a fixed allowance for them, have been borne by the parties, yet I presume in all cases by express agreement. And perhaps these instances may be defended on the maxim, *volenti non fit injuria*; but such charge can never be imposed on any party against his consent, so long as it is utterly destitute of legal sanction. To the allowance of the fees paid to counsel I find no sufficient objection. Although some alterations in the account were made by the orphans' court, yet in the most material matters excepted to, the account was supported.

Having thus examined and disposed of all the reasons assigned for setting aside the decree and order for sale, one interesting

and important inquiry yet remains, What, under the opinions expressed, is to be done with them? To reverse them entirely and send the parties back to commence a new course of litigation, would, if any other legal measure can be adopted, be doing them great injury. The proper step on our part has not been distinctly marked out for us. A removal by certiorari is authorized, but no further regulation is made. It will not, I think, be hazarding much to express a conviction that the convenience of parties and the ends of justice might more readily and safely have been attained, if, instead of the remedy by certiorari, an appeal had been authorized to the prerogative court, where both law and fact might have been reviewed, and the account and decree so changed and new modeled, if necessary, as to carry out the wise designs of the legislature in the management, disposal, and settlement of decedents' estates.

In the present case we have, on deliberation, concluded we may lawfully and rightfully adopt the following course of proceeding: If the administrator thinks proper to remit the interest for one year, which is charged on the several items of account, subsequent to the balance struck on the fifteenth of September, 1809, and also two seventh parts of the residue, being the proportion of the farm sold by him as one of the heirs, and also the expenses of the judges, we shall order that the decree on the account, and the order for sale as to the residue, be affirmed as to five seventh parts of the real estate, and reversed as to the other two seventh parts, being the part sold by him as heir, and without costs. If the administrator decline to make the remission above specified, we shall order that the decree and order for sale be entirely set aside and reversed,

Justice DRAKE did not sit in this cause, having been, while at the bar, of counsel with one of the parties.

COX v. BAIRD.

[6 HALSTED, 105.]

PAROL EVIDENCE OF DECLARATIONS, WHEN ADMISSIBLE.—Where an executor brings suit to recover rent from a person who was in possession for a number of years, parol evidence of the testator's declarations that such person was to pay no rent, is admissible.

CERTIORARI to the common pleas of Somerset county, to remove the judgment and proceedings on an appeal from the judgment of a justice in which Cox was appellant, and Baird,

executor of Dubois, was the appellee. Baird recovered a judgment before a justice for rent of premises, which had been occupied by Cox as the tenant of Dubois for some time previous to his death, and which he continued to occupy after the death of Dubois. The judgment was for one hundred dollars, the rent for the whole period. On the trial before the common pleas, the defendant moved for a nonsuit, which was denied. The defendant offered two witnesses to prove that the testator had stated to each of them repeatedly, while the defendant was occupying the premises, that he had purchased the premises for the defendant to live on as his own, free from any other charge than to pay to one Mary Cook her right of dower; that the defendant was to repair and improve the premises; that he had done so; and that the testator had stated to the witness that after purchasing and paying for the premises in question, he had a surplus of money in his hands belonging to the defendant. The defendant also offered another witness to prove that the testator had stated to her, at different times, that the defendant paid, and was to pay, the rent to the said Mary Cook annually for him as her right of dower in lands bought by him from her husband. To this testimony the plaintiff objected, and the court overruled the testimony. The court reversed the judgment of the justice below, and rendered judgment for the plaintiff for sixty-seven dollars and thirty-five cents.

Hartwell, for the plaintiff in certiorari, contended that this judgment ought to be reversed: 1. Because there was a misjoinder of action in this, that the plaintiff included in his state of demand two counts; one for rent accrued in his testator's life-time, and the other for rent accrued after his death. Rent becoming due after the testator's death goes to the heir and not to the executor: *Jacob L. D., Land. and Ten.* 99, 100; *Sacheverell v. Frogart*, 2 Levat, 18. A plaintiff can not join in the same action a demand as executor with another in his own right: 1 Chit. Plead. 202; 2. Because the court admitted improper, and rejected proper, evidence. Parol evidence is admissible, even in the case of a written contract, where it does not vary the original contract, but shows that it has been discharged: 2 Stark. 1002; 1 Phil. Ev. 444; Comyn on Con. 80, 81.

Vroom, contra.

By Court. This was an action for use and occupation. On the trial, the plaintiff proved the occupation of the defendant, and the annual value, and rested on the presumption of law that,

as executor, he was entitled to recover. The defendant offered to prove that the testator had declared he was to pay no rent, and to prove also the reason why he was to pay no rent. This evidence the court of common pleas overruled, in our opinion, improperly.

Judgment reversed.

PERRINE v. CHEESEMAN.

[6 HALSTED, 174.]

‘CONTRACTS IN WRITING, BUT WITHOUT SEAL, ARE CLASSED AS PAROL CONTRACTS, and if executory, may, before breach, be altered or rescinded by subsequent verbal agreements of the parties.

‘PAROL EVIDENCE IS NOT ADMISSIBLE to contradict, alter, or vary a written instrument, but such evidence is admissible to show that such written instrument never had an existence.

‘WAX, WAFER, OR SOMETHING CAPABLE OF RECEIVING AN IMPRESSION is, by the law of New Jersey, necessary to constitute a seal, except in instruments for the payment of money, on which a scroll, ink, or other device, affixed by way of seal, is made by the statute to have the same effect as if sealed with wax.

CERTIORARI to the common pleas of Monmouth county. The opinion states the case.

Stockton, for the plaintiff.

Ryall, for the defendant.

By Court, EWING, C. J. The reason assigned for reversing the judgment of the court of common pleas is that, “on the trial of the appeal, parol evidence was admitted to vary from and contradict a written agreement of the parties.”

The legal position stated by the plaintiff's counsel is maintained by the cases he cited, and is, without doubt, correct. The general rule of evidence, though sometimes difficult in its application to individual cases, and hence the cause of much legal investigation and controversy, is, nevertheless, fully established and universally recognized. Parol evidence is not admissible to contradict, alter, or vary a written instrument, either appointed by law or by the compact of the parties to be the appropriate and authentic memorial of the particular facts which it recites. Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the true and proper expositor of their admissions and intentions, is the only instrument of evidence in respect of that

agreement which, so long as it exists, the law will recognize for the purposes of evidence. Such being the law, to ascertain whether it governs the case before us, let us examine the facts as presented by the return to the certiorari. Cheeseman sued Perrine, among other things, for work and labor done in November and December, 1826, and March, 1827, in the repairs of certain premises belonging to the latter, then held by the former. To repel this demand, Perrine, on the trial, gave in evidence a written lease of the premises from the first of April, 1825, to the first of April, 1826, having thereon an indorsement in writing, signed by both parties, with, like the lease itself, scrolls or devices in ink, by way of seals, and attested by two subscribing witnesses in the following words: "This is to certify that I do agree to allow Enoch Cheeseman all reasonable charges for repairs done on the same property where he now lives, for a year next ensuing, as witness my hand and seal this fourteenth day of March, 1826; which both parties doth agree to fulfill the within lease." Cheeseman, on his part, then offered to prove by one of the subscribing witnesses, and by another person, "that they were both present at the time a verbal contract was entered into between the said Enoch Cheeseman and the said Peter Perrine for the rent of certain premises for one year from the first day of April, 1826, of which the said Enoch Cheeseman was then in possession, under a certain lease from the said Peter for the preceding year; that it was agreed between them that the terms of the said agreement should be indorsed on the copies of the leases held by each of them, and signed by the parties respectively; that it was so indorsed on the lease held by Peter Perrine, but that before the indorsement was made on the lease held by the said Enoch Cheeseman some difficulties arose between the parties, and they agreed to do away the leases altogether; and it was expressly agreed that the old lease and the indorsement made on the copy held by Peter Perrine should be of no effect, and, of course, no wise binding between the parties in their contract; and that they would make a new verbal contract without any reference to the old one." And Cheeseman further offered to prove by the said witnesses that accordingly a new agreement was verbally made between the parties, and also the terms of that agreement. The evidence thus offered was objected to by Perrine, but admitted by the court.

Upon the facts thus exhibited, it is manifest that the evidence proposed on the part of Cheeseman was not for the purpose of

varying from or contradicting an agreement in writing, which always presupposes a subsisting agreement actually entered into by the parties, but to show that such agreement in writing neither then had nor ever had existence, because, although inchoate and originally designed, it had never been consummated; and because, even if made, it had been rescinded by a subsequent agreement. The question, then, really raised, and to be decided on a review of the opinion of the court of common pleas, is whether the parol evidence was competent in this case for either of these purposes.

In the first place, then, the evidence was competent to show that the written agreement produced by Perrine never had legal existence; for such was the result, if the matters proposed to be shown were in point of fact sufficiently established; and proof of such matters can seldom, if ever, be made otherwise than by parol. The parties, it seems, had verbally agreed upon the terms of their contract, and had resolved, and such therefore was part of their agreement, that these terms should be reduced to writing. They had stipulated that instruments of writing, to be indorsed on the leases they mutually held, should be the evidence of their agreement. Until these instruments were both executed, it was evident the agreement was inchoate only, and had no binding efficacy or legal existence. When one only of them was signed, a difficulty arose: the other was not executed, and, consequently, the agreement never came into life. To produce, therefore, by Perrine, the instrument which had been taken by him, was an attempt to set up an incomplete for an actual, subsisting agreement, and might lawfully be repelled by such proof as was offered on the part of Cheeseman and received by the court. Even if a lease, signed and sealed by both parties, had been produced, it would have been clearly competent to prove, by a subsisting witness, that instead of counterparts or instruments, each to be executed by one of the parties, two instruments, each to be executed by both parties, were agreed on, and that one only being executed and taken by one of the parties, he had declined or refused to execute the other. In such case, the parol evidence does not usurp the place, or arrogate the authority of written evidence, but it is designed to show that the instrument, never having legally had existence, ought not be allowed at all to operate.

In the second place, the evidence offered was competent to show that the contract contained in the indorsement had been rescinded by a subsequent verbal agreement of the parties.

Contracts are distinguishable into two classes: simple contracts, and contracts by specialty; in other words, contracts by parol, and contracts under seal. Contracts reduced to writing, but without seal, are comprehended under the first class, or simple contracts. There is no distinct class of contracts merely in writing: *Rann v. Hughes*, 7 T. R. 350;¹ *Ballard v. Walker*, 3 Johns. Cas. 65, per Kent, J. An executory agreement in writing, not under seal, may, before breach, be discharged, abandoned, or rescinded by a subsequent under-written agreement: *Goman v. Salisbury*, 1 Vern. 240; *Langdon v. Stokes*, Cro. Car. 383;² *May v. King*, 12 Mod. 538; Buller N. P. 152; Com. Dig., tit. Action on the case upon assumpsit, G, 326; *Rich v. Jackson*, 4 Bro. C. C. 419; *Coles v. Trecothick*, 9 Ves. 250; *Pitcairn v. Ogbourn*, 2 Ves. 376; *Keating v. Price*, 1 Johns. Cas. [1 Am. Dec. 92]; *Fleming v. Gilbert*, 3 Johns. 528; *Botsford v. Burr*, 2 Johns. Ch. 416.

The indorsement on the lease before us, as well, indeed, as the lease itself, falls under the denomination of a simple or parol contract. There is no seal affixed to it. Wax, wafer, or something susceptible of receiving an impression, is necessary, by the law of New Jersey, to constitute a seal, except in instruments for the payment of money, to which a scroll or ink, or other device, affixed by way of seal, has, by the statute, the same force and obligation as if sealed with wax: Rev. Laws, 305, sec. 1; *Hopewell v. Amwell*, 1 Hals. 169. The argument of the plaintiff's counsel, drawn from the want of the term, only, after the words "payment of money," in the section referred to, can not prevail; because as the statute introduces an exception merely to the general rule, the sound construction must be precisely the same as if the term, only, had been inserted. Hence, it results that the contract contained in the indorsement, being a simple contract, might lawfully be rescinded by a subsequent parol agreement; and parol evidence to show it was so rescinded was competent and admissible.

In the decision of the court of common pleas there is, therefore, no error apparent to us.

Let the judgment be affirmed.

1. In note.

2. *Langdon v. Stokes*, Cro. Car. 383.

CASES
IN THE
COURT OF CHANCERY
OF
NEW YORK.

BIRDSALL V. HEWLETT.

[1 PAIGE CH. 23.]

DEVISE CONDITIONED ON PAYING LEGACIES.—Where, after a devise to another for life, land is devised to one in fee, provided that he pay the legacies given by the will, and the legacies are directed to be paid by the devisee, his heirs, executors, etc., on his or their coming into possession, the payment of the legacies is a condition of the devise, and upon the refusal of the devisee or his heirs to accept the devise and pay the legacies, the land descends to the testator's heirs, chargeable in equity, however, with payment of the legacies.

DEVISEE BECOMES PERSONALLY LIABLE for the legacies, upon accepting such devise.

SUCH LEGACIES REMAIN CHARGEABLE ON THE LAND, notwithstanding the devisee's personal liability.

LEGACIES CHARGED ON LAND LAPSE, WHEN.—The general rule is that legacies chargeable on land, and payable *in futuro*, are not vested, and lapse upon the legatee's death before the day of payment.

LEGACY DOES NOT LAPSE, WHEN.—Where land is devised upon the express condition of the payment of a legacy, the time of payment being postponed for the benefit of the estate without reference to circumstances relating to the legatee, the legacy vests upon the testator's death, and does not lapse upon the death of the legatee before the time of payment.

COSTS OF A SUIT TO RECOVER A LEGACY charged on land in the hands of a devisee, where payment is refused, become also a charge on the land.

LEGACY DRAWS INTEREST from the time it becomes payable.

BILL to obtain payment of a legacy, alleged to have been charged on land in the defendant's possession. The facts were: James Hewlett, sen., by his will, gave the plaintiff's intestate the legacy now sued for. He also devised to his widow certain real estate during life, or widowhood, and upon her death, or

marriage, devised the same estate in fee to his nephew, James Hewlett, provided he paid the legacies mentioned in the will. He further directed the legacies to be paid by the nephew, his heirs, executors, or administrators, whenever he or they should come into possession of the premises. James Hewlett, the devisee, and the plaintiff's intestate, both died in the life-time of the widow. The devisee, however, by some arrangement with the widow, entered into possession of the land devised in his life-time and conveyed a part of it. The widow died, unmarried, in 1825. The defendants, who are the heirs of James Hewlett, the devisee above named, were in possession of part of the land and refused to pay the legacy. Only one of the defendants answered, and the bill was taken *pro confesso* as to the others.

McCoun, for the complainants.

W. Tallmadge, for the defendants.

The CHANCELLOR. The payment of the legacies is a condition of the devise, and if the devisee, or his heirs, refuse to accept the devise and pay the legacies, the estate descends to the heirs at law of the devisor, but, in equity, chargeable with the payment. In this case, the devisee having accepted the devise, was personally liable for the legacies; but they are also an equitable charge upon the estate devised, in the hands of the defendants. It is undoubtedly a general rule, that legacies charged upon the real estate, and payable at a future day, are not vested, and become lapsed if the legatee dies before the time of payment arrives. This rule was at first adopted without any exceptions, and in direct opposition to that which existed in relation to the legacies payable out of the personal estate. This was done for the benefit of the heir at law, who was a particular favorite of the English courts. I am not aware that it has ever been extended to a case where the estate was given to a stranger, upon the express condition that he paid the legacy charged thereon; and the rule has long since been much narrowed down, even as between the legatees and the heir at law.

In this case, the estate being given upon the express condition of the payment of the legacy, and the time of payment being postponed for the benefit of the estate, and not with reference to any particular circumstances in relation to the legatee, which might render it doubtful whether the legacy would ever be wanted; the legacy became vested at the same time that the estate in remainder became vested in the devisee;

that is, at the death of the testator. It was transmissible to the personal representatives of the legatee, and the complainant is entitled to a decree for the payment out of the estate. The defendants having neglected and refused to pay the legacy, by which the complainant has been put to the expense of this litigation, the costs of the suit must also be charged upon the estate. The legatees are also entitled to interest from the time when the legacies became payable, by the death of the widow: *Glen v. Fisher*, 6 Johns. Ch. 33 [10 Am. Dec. 310].

RELIED ON AS AUTHORITY FOR THE FOLLOWING POSITIONS: That a devisee, accepting a devise charged with the payment of a legacy, becomes personally liable to pay the same: *Spencer v. Spencer*, 4 Md. Ch. 462; *Judge of Probate v. Kimball*, 12 N. H. 170; *Perry v. Hale*, 44 Id. 365; *Zerby v. Zerby*, 9 Watts, 236; but see *Mesick v. New*, 7 N. Y. 167, where this doctrine as laid down in the principal case is referred to as *dictum*, and is held to be applied only where there is a direction in the will that the devisee pay the legacy; that notwithstanding this personal liability of the devisee the legacy nevertheless remains a charge upon the land and its income, into whatever hands it may come: *Pickering v. Pickering*, 15 N. H. 290; *Shreve v. Shreve*, 17 N. J. Eq. (2 C. E. Green), 492; *Fox v. Phelps*, 17 Wend. 403. So, whether the devisee accepts or not: *Martin v. Ballou*, 13 Barb. 136; that where a legacy is given on condition, the legatee, if he accepts, must perform the condition: *Wheeler v. Lester*, 1 Bradf. Surr. 298; that a legacy payable *in futuro*, and charged upon personalty, vests from the testator's death, but that if it is charged upon realty it lapses ordinarily if the legatee dies before the day of payment: *Larocque v. Clark*, 1 Redf. 471; *Saxton's Estate*, Tucker, 33; that where a bequest is given to one for life, and after his death to another, the interest of the latter is vested, although he should die in the life-time of the prior legatee, and his personal representative may recover it after the death of the prior legatee: *Barker v. Woods*, 1 Sand. Ch. 131; that where payment of a legacy is postponed for the benefit of the estate, and not from any consideration personal to the legatee, it is not thereby prevented from vesting although the legatee should die before the day of payment: *Fuller v. Wintthrop*, 3 Allen, 60; *Marsh v. Wheeler*, 2 Edw. Ch. 164; *McKinstry v. Sanders*, 2 Thomp. & C. 188, *per* Miller, P. J.; *Delavergne v. Dean*, 45 How. Pr. 209; *Sebastian's estate*, 4 Phila. 240; and that a legacy payable at a specified time bears interest from that time: *Loring v. Woodward*, 41 N. H. 393.

WHEN LEGACY VESTS.—See, on this point, *Price v. Watkins*, 1 Am. Dec. 222; *Stone v. Massey*, Id. 345; *Boone v. Sinkler*, Id. 622; *Bowles v. Drayton's Executors*, Id. 689; *Fairly v. Kline*, 4 Id. 414; *Scott v. Price*, 7 Id. 629.

LEGACY CHARGED ON LAND is not recoverable by a joint action against the devisee and terre-tenants without an express promise to pay it: *Brown v. Furer*, 8 Am. Dec. 693. As to when a devisee is personally liable for the payment of a legacy, see *Van Orden v. Van Orden*, 6 Am. Dec. 314; *Glen v. Fisher*, 10 Id. 310.

INTEREST ON LEGACY.—As to when a legacy draws interest, see *Van Bramer v. Hoffman's Executors*, 1 Am. Dec. 162; *Glen v. Fisher*, 10 Id. 310.

IN THE MATTER OF HOWE.

[1 PAIGE CH. 124.]

WHERE A TENANT IN COMMON HAS MORTGAGED his undivided interest in the common land, and a voluntary partition is afterwards made between himself and his co-tenants, he releasing to them his interest in the part assigned to them, the mortgage remains a lien at law on their part, and they are necessary parties to a suit for foreclosure.

CO-TENANTS OF THE MORTGAGOR HAVE AN EQUITABLE RIGHT, in such case, to have the portion set apart to him in the division sold to satisfy the mortgage, or if it has been sold, to have the proceeds so applied.

BANKRUPT'S ASSIGNEES TAKE SUBJECT TO EQUITABLE CLAIM.—The general assignees of a bankrupt take the estate subject to all existing equitable claims of third persons, and can not defeat such claims though they had no notice thereof at the time of the assignment, they not being regarded as *bona fide* purchasers.

VOLUNTARY ASSIGNEES FOR THE BENEFIT OF CREDITORS are subject to the same rule.

JUDGMENT-CREDITORS CAN NOT PREVAIL AGAINST A PRIOR EQUITY of third persons attaching to land of the debtor.

AGREEMENT FOR A MORTGAGE is in equity a specific lien on land.

PETITION to have certain moneys applied to the satisfaction of a mortgage which was alleged to be a lien on land belonging to the petitioners. The facts were: Howe and wife, the petitioners, were seized, prior to 1817, of an undivided half of certain land, one Dunham and one D. D. Tompkins being also seized of an undivided fourth each of the same land. Tompkins' share was subject to the lien of a mortgage given by him to one Banks, in 1806. In January, 1817, an unequal division of the land was made, Dunham and Tompkins releasing two lots to the petitioners, and paying them also a certain sum in money, and the petitioners releasing the remainder of the land to Dunham and Tompkins as tenants in common. In 1821, Banks, without noticing the partition, filed a bill for foreclosure, in which the petitioners were not made parties. The court decreed a sale of an undivided fourth part of the premises as originally mortgaged, and Banks became the purchaser, leaving a large balance due on his mortgage. In 1821, sundry judgments were recovered against D. D. Tompkins, which are now held respectively by one G. W. Tompkins and the executors of one Minthorne. In 1822, D. D. Tompkins made a general assignment of his property to trustees for the payment of his debts. Two days thereafter, Cornelia Juhel recovered a judgment against the said Tompkins. In 1825, on a bill filed by one of the heirs of Dunham for a partition of the portion of

land released to Dunham and Tompkins by the petitioners, a decree was made, under which the said portion was sold, one half the proceeds paid to the representatives of Dunham, one fourth to Banks, and the remaining fourth was in the hands of the master, subject to the order of the court. The petition was for the application of this money to the balance due on Banks' mortgage (which exceeded the fund in court), for the purpose of discharging the lien of the mortgage on the two lots heretofore released to the petitioners. The money was also claimed by the assignees of Tompkins and by the judgment-creditors above named.

C. C. King, for the petitioners.

W. Kent, for G. W. Tompkins.

D. S. Jones, for Minthorne's executors.

H. W. Warner, for the assignees of Tompkins.

W. Slosson, for Cornelia Juhel.

The CHANCELLOR. If the division of the property between the original owners threw the whole mortgage, previously given by Tompkins, upon his undivided half of the premises released to himself and Dunham on that division, Banks would clearly be entitled to the funds in the hands of the master to satisfy the balance now due on his mortgage. That balance would still remain a lien upon so much of that undivided half as was not sold under the decree of foreclosure. But if, after that division, as I am inclined to believe under the circumstances of this case, the mortgage remained a lien at law upon the one fourth of the two lots conveyed to Howe and wife in severalty, the foreclosure was a nullity as to these lots, Howe and wife not being parties thereto. And the balance due on the mortgage being a subsisting lien on the undivided fourth part of the two lots, it may still be enforced against them.

Howe and wife have therefore a direct interest in having this balance paid out of the moneys arising from the sale of that part of the property which they gave him in exchange on the original division. As between Howe and wife and Tompkins, there could be no doubt of their equitable claim to have those moneys thus applied. If Banks had filed his bill to foreclose the mortgage immediately after that division, and had made Howe and wife and Dunham parties to the same, there can be no doubt that this court would have decreed a sale of the share assigned to Tompkins on that division, to satisfy the mortgage. And the ques-

tion which now arises is this: Are the equitable rights of Howe and wife altered or divested by the general assignment of Tompkins for the benefit of his creditors, or by the judgments which have been recovered against him subsequent to that division? It is a well-settled rule of equity, that the general assignees of a bankrupt take his estate subject to every equitable claim which exists against it by third persons; and that they can not avail themselves of the legal estate thus acquired, to defeat a prior equity, of which they had no notice at the time of the assignment. They differ in this respect from *bona fide* purchasers of the legal estate, and from mortgagees who have advanced their money on the credit of the land, and who are considered *quasi bona fide* purchasers. I can see no good reason why a different rule should be applied to general assignees for the benefit of all the creditors, created by the voluntary act of the debtor, from that which prevails in respect to those created by operation of law. Neither can be considered as *bona fide* purchasers, who are protected because their legal estate is united to an equal, though subsequent, equity. *Sir Simon Stuart's case*, referred to by the counsel and by the lord chancellor, in *Burn v. Burn*, 3 Ves. jun. 576, was an actual conveyance to trustees for the benefit of creditors, and yet it was held that a prior contract for a mortgage was entitled to a preference. The case might be different where creditors, without notice of the prior equity, had released their debts in consideration of an assignment made to trustees for their benefit.

The judgment-creditors of Tompkins are in no better situation than his general creditors in relation to this fund. Their judgments were not specific liens on the land to which the petitioner's equity attached. They were general liens on all the estate of the judgment-debtor; but as such they can not prevail as against the prior equity of the petitioners. I have not found any reported case in this state, where this question has been examined. It has frequently been discussed in the English courts, and sometimes in the courts of this country; and I have once had occasion to examine it in the equity court for the fourth circuit. The earliest case on this subject which I have found, is *Burgh and Burgh v. Francis and others*, decided by Lord Keeper Finch, in 1670: Cas. Temp. Finch, 58; 1 Eq. Cas. Abr. 320, S. C. In that case, a bill was filed by the executors of an equitable mortgagee against the heir at law of the mortgagor, and his judgment-creditors, to perfect a defective conveyance by way of mortgage, and to be relieved against the judgments

which at law were a lien upon the mortgaged premises. The court decreed a perpetual injunction against the judgment-creditors, unless they should choose to come in and redeem the mortgage, which the heir at law was directed to give. This decree is said to have been afterwards affirmed by Lord Nottingham: *Per Vernon, arguendo*, 1 P. Wms. 279. There is a note in Fonblanque's Treatise on Equity (1 Fonb. 34, note r), referring to that case, and by which its authority is attempted to be shaken. But the annotator is evidently wrong in supposing that is the only case to be found in the books where a court of equity has interfered, in prejudice of a defendant having a legal interest for a valuable consideration and without notice. The decision in the *Suffolk case*, referred to in Nelson's Reports (1 Nels. Ch. 184), supports the decision in *Burgh v. Francis*; and in 1715, the same principle was most distinctly recognized by Lord Cowper, in the case of *Finch v. The Earl of Winchelsea*, 1 P. Wms. 282. In *Burn v. Burn*, 3 Ves. jun. 576, the counsel, Sir John Scott, attorney-general (afterwards Lord Eldon), and Mr. Mitford, solicitor-general (afterwards Lord Redesdale), state it as a well-known principle, that courts of equity constantly control the effect of judgments subsequent to a contract for the sale of the estate. And in the case of *Sir Simon Stuart's estate*, before referred to, it was also held that the equitable mortgagee was entitled to a preference over subsequent judgment-creditors.

In *Delaire v. Keenan*, 3 Desau. 74, the court of chancery of South Carolina decided that an agreement for a mortgage was in equity a specific lien on the land; and that the mortgagees were entitled to a preference over subsequent judgment-creditors. Chancellor Desaussure, in delivering his opinion, refers to the decision of Lord Cowper, in *Finch v. The Earl of Winchelsea*, and says the opinion delivered in that case has been the settled doctrine ever since. The same principle was sanctioned by the supreme court of Pennsylvania in the case of *Foster v. Foust*, 2 Serg. & R. 11, and by Washington, justice, in the case of *Hurst v. Hurst*, in the circuit court of the United States, 2 Wash. C. C. 69; 3 Binn. 347, note, S. C. The same principle is recognized by several elementary writers as the established doctrine of the courts of equity in England: Sugden's Law of Vendors, 336; 2 Cruise's Dig. 64, tit. 14, Estate by Statute, Merchant, sec. 50.

In the matter before me I can decide in favor of the manifest equity of the case, not only without disturbing any known

legal or equitable principle, but in perfect accordance with the settled doctrines of this court. I shall therefore direct the moneys in the hands of the master to be paid over to Banks in satisfaction of the balance due on his mortgage.

THE AUTHORITY OF THIS CASE IS RECOGNIZED in the New York courts and others on the following points: That a judgment lien is subject to prior equities in favor of third persons, and will be controlled in equity to protect the rights of such persons and of *bona fide* purchasers: *Arnold v. Patrick*, 6 Paige, 316; *Sweet v. Jacobs*, Id. 360; *White v. Carpenter*, 2 Id. 286, 287; *Buchan v. Sumner*, 2 Barb. Ch. 207; *Shirley v. Sugar Refinery*, 2 Edw. Ch. 509, where the vice-chancellor comments at length on the decision; *Stymets v. Brooks*, 10 Wend. 212; *Dwight v. Newell*, 3 N. Y. 187; *Moyer v. Hinman*, 13 Id. 190; *Robinson v. Williams*, 22 Id. 386; *Brown v. Pierce*, 7 Wall. 218; *Hulett v. Whipple*, 58 Barb. 229, 230, 231, where the principal case is distinguished, and it is held that the claim of a judgment creditor who has advanced his money on the credit of an unincumbered title is to be preferred to the secret unrecorded lien of the vendor for the purchase-money; that a judgment transfers no title, but simply creates a general lien: *Lane v. Ludlow*, 2 Paine, 599; that a general assignee for the benefit of creditors is not a *bona fide* purchaser, and therefore takes subject to all equities against the debtor: *Slade v. Van Vechten*, 11 Paige, 23; *Leger v. Bonnafie*, 2 Barb. 479; *Taylor v. Baldwin*, 10 Id. 637; *Sieman v. Austin*, 33 Id. 20; *Maas v. Goodman*, 2 Hilt. 280; *Schieffelin v. Hawkins*, 14 Abb. Pr. 118, S. C., 1 Daly, 294; that in order to constitute one a *bona fide* purchaser, entitled to protection against a prior legal or equitable right of which he had no notice, he must have parted with something of value in payment for the title before receiving notice: *Ray v. Birdseye*, 5 Denio, 626; *Wood v. Robinson*, 22 N. Y. 567; that a mortgagee who has advanced money in good faith on the credit of a title is a *bona fide* purchaser: *Tallman v. Farley*, 1 Barb. 285; *King v. Wilcomb*, 7 Id. 268; 7 Id. 268; *Fassett v. Smith*, 23 N. Y. 261; that an agreement for a mortgage is a specific lien and is to be preferred to the general lien of a subsequent judgment: *Otis v. Sill*, 8 Barb. 119; *Seymour v. Canandaigua, etc. Co.*, 25 Id. 303; S. C., 14 How. Pr. 536; *Chase v. Peck*, 21 N. Y. 584; *Wright v. Shumway*, 1 Biss. 27; that a bond given to pay off a mortgage insures like a covenant, running with the land, to the benefit of a subsequent purchaser of the same land: *Kellogg v. Wood*, 4 Paige, 582.

CANDLER v. PETTIT.

[1 PAIGE CH. 166.]

SUPPLEMENTAL BILL WHERE ORIGINAL IS DEFECTIVE.—Proceedings founded on an original bill, so entirely defective that no valid decree can be made, can not be sustained by a supplemental bill based on subsequent facts.

AMENDMENT OF DEFECTIVE BILL, WHEN PROPER.—Where a bill is defective in omitting facts existing at the time, they should be inserted by amendment.

NEW BILL PROPER REMEDY, WHEN.—Where a complainant had no ground for proceeding originally, but subsequently becomes entitled to relief, he should file a new bill.

SUPPLEMENTAL BILL IS PROPER WHEN the original bill is sufficient to entitle the complainant to one kind of relief, and facts afterwards occur giving him a right to other or more extensive relief.

COURT HAVING OBTAINED JURISDICTION FOR TEMPORARY RELIEF may retain it generally.

SUPPLEMENTAL BILL FOR AN INJUNCTION may be filed, founded on facts subsequently arising, where the original bill was for a *ne exeat* and an injunction, and the injunction was disallowed because the party was not then entitled to it.

JUDGMENT CREDITOR MAY RESORT TO EQUITY, WHEN.—A judgment creditor, having proceeded to execution, may resort to equity to reach property not in itself liable to execution.

INJUNCTION AGAINST THE DEBTOR'S DISPOSING OF HIS PROPERTY, in such a case, after the return of the execution unsatisfied.

BILL for a *ne exeat* and injunction against the defendant, pending an action against him at law. The writs were granted by the master, but the chancellor afterwards dissolved the injunction on the ground that the complainant was not entitled to it to prevent the defendant's disposing of his property until after an execution issued at law and returned unsatisfied. After proceeding to judgment and execution at law, the complainant filed a supplemental bill for an injunction. Temporary injunction granted and a rule made requiring the defendants to show cause why it should not be made absolute.

George Brinckerhoff, for the defendants, contended that as there was no ground of suit originally the complainant could not by a supplemental bill obtain an injunction founded on subsequent occurrences.

R. Sedgwick, contra.

THE CHANCELLOR. If the original bill is wholly defective so that no valid decree could be made thereon, the party can not, by filing a supplemental bill, founded upon matters which have subsequently taken place, sustain the proceedings originally commenced. If the facts existed before the filing of the original bill, they should be inserted therein by way of amendment. And if the complainant had no ground for the proceeding originally, he should file a new bill, showing a case which will then entitle him to equitable relief. But if his original bill was sufficient to entitle him to one kind of relief, and facts subsequently occur which entitle him to other or more extensive re-

lief, he may have such relief by setting out such new matter in the form of a supplemental bill.

In this case the original bill was sustainable on the ground that the bail had become insolvent, and that there was sufficient shown to authorize the issue of the *ne exeat*: *Porter v. Spencer*, 2 Johns. Ch. 169. In such cases the party is not confined to the temporary relief sought, but the court having gained jurisdiction of the cause for the purpose of such temporary relief, may retain it generally: *Per Spencer, Justice, in Rathbone v. Warren*, 10 Johns. 596. The supplemental bill is therefore properly filed; and I think, on the facts disclosed, the complainant is entitled to the special relief prayed for in the supplemental bill.

The case of *Hadden v. Spader*, in the court of errors of this state: 20 Johns. 554; and *Taylor v. Jones*, 2 Atk. 600; and *Edgell v. Haywood and Dawe*, 3 Atk. 352, in the English court of chancery, show that, after a party has proceeded to judgment and execution at law, he may, by the aid of a court of equity, reach property in the hands of a third person which was not in itself liable to execution. I have recently had occasion to declare, in a case which was before me in the equity court of the fourth circuit, that "every person should be permitted to exercise the most liberal and extended discretion as to the time and manner of disposing of his property, vesting the proceeds thereof, and of collecting his debts; provided he exercises that discretion fairly and honestly in reference to the equitable rights of his creditors to be paid out of the same, and without any view or intention of delaying, hindering, or preventing them from obtaining their lawful dues and demands. But whenever he exceeds these limits of his legitimate authority and power over his property and funds, whenever there is reason to believe he has exercised that power with intent to delay, hinder, or defraud those who have a claim upon that property and those funds for the satisfaction of their just demands, such exercise of power becomes unconscientious and inequitable; and a court of equity will then control and regulate its exercise, in such a manner as to compel him to do justice to his creditors. Such an unconscientious exercise of power by the debtor is a fraud upon the creditor:" Opinion in *Weed & Marvin v. Pierce and others*.

The rule for an injunction in this case must be made absolute.

SUPPLEMENTAL BILL MAY BE FILED, WHEN.—As to when a supplemental bill or complaint may be filed, the principal case is cited in *Stihwell v. Van*
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Epps, 1 Paige, 616; *Hasbrouck v. Shuster*, 4 Barb. 233. In *Robbins v. Wells*, 1 Rob. (N. Y.) 673; S. C. 18 Abb. Pr. 195; 26 How. Pr. 21; it is held, referring to *Candler v. Pettit*, as authority, that leave granted to file a supplemental complaint does not establish the plaintiff's right to sue for the original cause of action, and that the court, seeing from the face of the supplemental complaint that the former action was fatally defective, may refuse judgment: In *Bostwick v. Menck*, 8 Abb. Pr., N. S. 170, the principle laid down above, that where the original complaint shows the plaintiff entitled to one kind of relief, and facts subsequently occur giving him a right to other or more extensive relief, is approved and applied.

CLARK v. FISHER.

[1 PAIGE CH. 171.]

TESTAMENTARY CAPACITY.—To make a valid will, the testator must be of sound and disposing mind and memory, capable of disposing of his property with sense and judgment with respect to the condition and value of the property and the relative claims of the objects of his bounty.

OPINIONS OF WITNESSES are never received as evidence where all the facts on which they are founded can be ascertained and made intelligible to the court or jury.

WEIGHT OF OPINIONS OF WITNESSES AS EVIDENCE, when necessarily received, depends not so much on the number of the witnesses as upon their capacity and opportunities for information, the unprejudiced state of their minds, and the nature of the facts.

BURDEN OF PROOF AFTER GENERAL DERANGEMENT ESTABLISHED.—When general derangement or loss of the mental powers of a testator, before the making of his will, is established, the burden of proof is upon the proponents of the will to show that the incapacity had ceased at its execution.

UNREASONABLENESS OF THE WILL IS PROPER EVIDENCE with respect to the state of the testator's mind.

WILL INDUCED BY FRAUD, IMPOSITION, OR UNDUE INFLUENCE, which makes a different disposition from that which the testator would otherwise have made, will be set aside in a court of equity.

SURROGATE'S JURISDICTION AS TO FRAUD AND UNDUE INFLUENCE.—Surrogates having exclusive jurisdiction of the proof of wills of personalty must necessarily determine all questions of fraud, imposition, undue influence, and testamentary capacity, in the case of such a will.

APPEAL from a decree of the surrogate of Kings county. The opinion states the case.

W. Kent and D. B. Ogden, for the appellants, as to what constitutes testamentary capacity, cited: Swinb. on Wills, pt. 2, sec. 8; Moore, 759; *Marquis of Winchester's case*, 6 Co. 23 a; 2 Evans' Poth. on Ob. 539; and as to the burden of proof being on the respondents after incapacity, prior to the making of the will, being established, they referred to 1 Phillim. 535, 567, 570; 4 Cow. 287.

D. S. Jones and P. A. Jay, for the respondents, argued that the court should not rely upon the opinions of the witnesses as to the testator's capacity, but upon the facts upon which they were founded, and that difference of opinion among the witnesses was due to their different abilities and opportunities for observation: *Kinlyside v. Harrison*, 2 Phillim. 454. They claimed also that the same mind is required in making contracts as in making wills: 1 Shep. Touch. 403.

The CHANCELLOR. This cause comes before this court on an appeal from a sentence and decree of the surrogate of Kings county, allowing and admitting to probate an instrument propounded by the respondents as the last will and testament of John Fisher, late of Brooklyn, deceased. The two Mrs. Clarkes are the nieces and next of kin of the deceased, who left a large real and personal estate. He died in May or June, 1827, being then about eighty years of age. About four years previous to his death, and about one year before the death of his first wife, he had an apoplectic fit, which terminated in paralysis and continued until his death. He was confined to his bed for the four years, but was able to ride out a few times, being helped into the carriage. His speech was much impaired, but he was at times able to make himself understood by those who were well acquainted with him. In the fall of 1824 he was married to Diana Rapelje, the respondent, a sister of his first wife. The will in controversy was executed in May, 1827, shortly before his death, and he thereby gave all his property, real and personal, to his wife in fee; but afterwards, in the same will, he gave one fourth of his property after the death of his wife, to a supposed daughter of his deceased brother, Lawrence Fisher, and the annual interest thereon for her education, and the remaining three fourths to the heirs of Eleanor Clarke, Maria Clarke, Ann Smith, and Isaac Rapelje. The respondents were made executrix and executor, with a general power to sell. Lawrence Fisher, in fact, died without issue, and the pretended niece was a child which his widow had stolen from the almshouse and claimed as her own. The appellants insisted that the testator was incompetent to make a will, or, if not wholly incompetent, that the same was procured by fraud and imposition, and by taking an undue advantage of his situation. Between fifty and sixty witnesses were examined to these questions by the different parties, before the surrogate.

The general principles of law in relation to the capacity of a person to make a will, are well understood. He must be

sound and disposing mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment in reference to the situation and amount of such property, and to the relative claims of the different persons who are or might be the objects of his bounty: *Marquis of Winchester's case*, 6 Co. 23; *Den v. Johnson*, 2 South. 458 [8 Am. Dec. 610]. But the great difficulty which generally exists is in applying these principles to the testimony in each particular case. The evidence of capacity on which the court or jury are to decide in most contested cases, consists in the opinions of witnesses, sometimes with, but frequently without, the particular facts on which such opinions are founded. Such testimony is always the most unsatisfactory, and the least to be depended on. Our opinions are much more frequently founded on prejudices, or biased by our feelings, than we are aware of. Hence it frequently happens that two witnesses, equally honest and intelligent, form opinions directly opposite to each other, founded on the same state of facts. It is for this reason that the opinions of witnesses are never received as evidence where all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury. And where the opinions of witnesses, from the necessity of the case, are received as evidence, the weight of testimony will not depend so much upon the number as upon the intelligence of the witnesses and their capacity to form correct opinions, their means of information, the unprejudiced state of their minds, and the nature of the facts testified to in support of those opinions.

Testing the case before me by these principles, it is satisfactorily established that, at the commencement of the disease of John Fisher, there was a general derangement or destruction of the powers of his mind, so as wholly to incapacitate him to make a will. This is proved by the testimony of his attending physicians; of Robert Lowther, who was with him eleven months in the capacity of nurse; of Bishop Onderdonk, who made him pastoral visits for the purpose of administering spiritual consolation; of General Bogardus, who went to see him several times on business; and of many others who were in habits of intimacy with him before his sickness, and who continued to visit him until they supposed his disease incurable and his mind irretrievably gone. In opposition to this, a few persons of very limited capacity to judge on such matters, testify that he was as capable of doing business during the whole of his sickness as he ever was before. It being established that there

was a general derangement or loss of the powers of mind for a very considerable period some time previous to the making of the will, the weight of proof was thrown upon the respondents to establish the fact that such incapacity had ceased at the time the will was executed: *Kinlock v. Palmer*, 2 Const. B. S. C. 225; *Lessee of Hoge v. Fisher*, 1 Peters' C. C. 163; *Attorney-general v. Parnter*, 3 Bro. Ch. 443; Swinburne on Wills, part 2, seq. 3; *Turner v. Turner*, 1 Little's R. 102;¹ *Jackson v. Van Duzen*, 5 Johns. 159 [4 Am. Dec. 330]; *Case of Cochrane's will*, 1 Munroe's R. 263.² After the first year of his disease, very few of those persons who had known and associated with him previous to his sickness, and who alone were capable of comparing his mind in its diseased state with what it was before, visited his house. Among the witnesses who did see him during the three last years of his life there is a very great contrariety of opinion as to the situation of his mind, and even as to the state of his corporeal faculties. I think the weight of testimony is that in the summer of 1826 his mental and corporeal powers were in a more vigorous state than they had been during the first two years of his sickness. The testimony of Dr. Watts, in particular, shows that he could then converse intelligibly; and certainly he exhibited considerable strength of memory in relation to the papers of Lord Sterling. That circumstance, though strongly in favor of his mental capacity at that time, is not conclusive. It frequently happens that some particular circumstance has made a strong impression upon the mind of an individual, and has been thought over so often that the memory on that subject becomes in a measure mechanical; and whenever one link in the chain of circumstances is touched, the whole subject again passes through the mind. Hence it sometimes happens in second childhood, when all traces of recent events have become completely effaced from the memory, the bare mention of some occurrence which made a strong impression upon the mind of the individual in early life will bring the whole subject distinctly to his recollection, and he will be able to detail every circumstance with the most minute exactness. I am, therefore, not perfectly satisfied, considering the nature of the disease under which Fisher was laboring, that even at that time he was of sufficient capacity to dispose of his property by will with sense and judgment.

Whatever may have been his situation in the summer of 1826, there are still stronger reasons to doubt his capacity in May,

1. 1 Littlell, 102.2. *Case of Cochrane's Will*, 1 T. B. Monroe, 263.

1827, when the will was executed. He was not then in a situation to make himself understood by the person who drew it, even in reply to questions put directly to him. The will was drawn under the direction of the wife, the principle devisee; and although she professed to converse with and to understand him, the scrivener had no means of knowing whether he assented to her propositions or not, or whether he understood what was said to him, or what business was transacting. If his mind had been once partially restored there is reason to believe he was then suffering from another attack of the same disorder, and which carried him off within a few days afterwards. Besides, the will itself is unreasonable on its face, when taken in connection with the amount of his property and the situation of his relatives; and this is always proper evidence to be taken into consideration in judging of the state of the testator's mind: *Patterson v. Patterson*, 6 Serg. & R. 56.

But if it were doubtful whether the testator's mind was so far impaired as to render him incapable of making a valid will, there can not be a question that it was so much weakened, and rendered so imbecile by disease, as to make him an easy dupe to the arts and intrigues of those by whom he was surrounded. Whenever a person in that situation is induced by fraud, imposition, or undue influence to make a testamentary disposition of his property differently from what he would in the full possession of his faculties, the same will be set aside, upon the same principle that a court of chancery sets aside a conveyance of property obtained under like circumstances. Surrogates having exclusive jurisdiction in relation to the proof of wills of personal property, they must of necessity determine all questions of fraud, imposition, and undue influence in procuring such wills, as well as the general question relative to the capacity of the testator: *Kerrich v. Bransby*, 3 Bro. P. C. 358; *Bennet v. Vade*, 2 Atk. 324; *Archer v. Mosse*, 2 Vern. 8; *McDowall v. Peyton*, 2 Desau. 813; 1 Roberts on Wills, 30.

In the case of the will of Edward Campion, a court of delegates, consisting of some of the most distinguished judges and civilians in England, set the will aside on the ground that undue influence had been exercised over the mind of the testator by his housekeeper and physician; and Lord Rosslyn, being satisfied with their decision, reported against granting a commission of review: *Ex parte Fearon*, 5 Ves. 633. In *Hacker v. Newbern*, Styles' B. 427,¹ Rolle, C. J., held that a will, executed

1. *Hacker v. Newbern*, Styles' B. 427.

by a man in his last sickness, by the over-importunity of his wife, and for the sake of quiet, was not valid. In *Deitrick v. Deitrick*, 5 Serg. & R. 207,¹ on an issue to try the validity of a will, the person attempting to impeach it on the ground of imbecility and imposition, was permitted to give evidence of the false representations of the principal devisee, as to the character of the wife of another, who was equally entitled to the testator's bounty, by reason of which he was disinherited. The same principle is recognized in *Nusscar v. Arnold*, 13 Serg. & R. 323. And in *Patterson v. Patterson*, 6 Id. 56, where it was attempted to impeach a will on the ground of imbecility of mind, connected with fraudulent practices by the devisees, the party was permitted to give in evidence the situation of the testator's family connections and property, for the purpose of showing the unreasonableness and injustice of the provisions of the will.

Applying the principles of these cases, and the doctrine held by the court of errors in *Whelan v. Whelan*, 3 Cow. 537, to the circumstances disclosed by the testimony before the surrogate, this will must be set aside as unduly obtained by taking advantage of the situation and infirmities of this bed-ridden, paralytic old man, by which a different disposition was made of his property from that which would otherwise have taken place. The testimony of Robert Lowther shows that immediately after the death of the first Mrs. Fisher, her relations commenced a system of intrigue and management for the purpose of getting control of the person and property of the testator. For this purpose his niece, who had been in the habit of visiting him previously, was virtually excluded from the house; and means were taken to prejudice the testator against her, by representing in his presence and hearing that her visits and attentions to him were mercenary. They urged him to get married, as a means of restoring him to health; and the sister of the first Mrs. Fisher was placed about him, and recommended as a suitable person for his wife. In the course of a few months he was induced to consent to the ceremony of a marriage, which in his situation never was or could be consummated. Having thus secured the control of his person, a wife was procured for the lunatic brother, and he was importuned to get the testator to make a will in their favor; and after the death of that brother, his widow procured from the alms-house a child which was imposed upon the testator as his niece. Although there is no direct

1. *Deitrick v. Deitrick*, 5 S. & R. 207.

evidence of the fact, yet from the intimacy which had existed between the widow of Lawrence Fisher and the respondent, Diana Fisher, there is reason to suspect the latter was not ignorant of the deception which was practiced. The testator was then induced to execute this will, giving one fourth of his property to the supposititious niece, and the residue to his wife for life, with power to her and the co-executor to sell and dispose thereof as they pleased, and what was left after her death was to be equally divided among the children of his nieces and the descendants of two of her own relations; thus, without any apparent cause, excluding the two Mrs. Clarkes, who were his only blood relations, from any share in his property.

On either of the grounds taken by the appellant's counsel, I am satisfied that the sentence and decree of the surrogate, allowing the instrument propounded as the last will and testament of John Fisher, and admitting the same to probate, was erroneous; and the same must be reversed.

INSANITY AFFECTING TESTAMENTARY CAPACITY OR CAPACITY TO CONTRACT.—This subject is discussed at length in the note to *Jackson v. King*, 15 Am. Dec. 361; see, also, *Brown v. Brown*, 8 Id. 187; *Wait v. Mazzeck*, 16 Id. 391; *Owings' case*, 17 Id. 311. The principal case is cited on this point in *Delafield v. Parish*, 1 Redf. 140; S. C., 25 N. Y. 26; *In re Welsh*, 1 Redf. 244; *Nezzen v. Nezzen*, 2 Keyes, 238, per Potter, J., dissenting; *Matter of Forman's Will*, 54 Barb. 237. In *Clarke v. Sawyer*, 3 Sandf. Ch. 406, the same will came under consideration, with respect to the testator's realty, and the vice-chancellor, conceiving himself not to be bound by the chancellor's decision that the will was invalid, so far as it affected personalty, held the will valid, but this decision was reversed by the chancellor: S. C., 2 Barb. Ch. 411, which latter decision was affirmed in 2 N. Y. 498.

UNDUE INFLUENCE AFFECTING TESTAMENTARY CAPACITY.—See, on this point, the note to *Small v. Small*, 16 Am. Dec. 257. The authority of the principal case on that subject is recognized in *Lake v. Ranney*, 33 Barb. 69.

OPINIONS OF WITNESSES.—See the note to *Dickinson v. Barber*, 6 Am. Dec. 59; see, also, *Norman v. Wells*, 17 Wend. 163; *Culver v. Haslam*, 7 Barb. 323; *Dewitt v. Barley*, 9 N. Y. 392, citing and approving the doctrine of *Clark v. Fisher* on this point.

JURISDICTION IN WILL CASES.—The principal case is cited and approved in *Heyer v. Burger*, 1 Hoff. Ch. 10, on the point that chancery has no original jurisdiction to try the validity of a will of personalty; and in *Burger v. Hill*, 1 Bradf. 371, to the point that the surrogate has jurisdiction in the first instance to determine all questions of fraud, undue influence, imposition, mistake, etc., affecting the validity of a will.

FULTON v. ROSEVELT.

[1 PAIGE CH. 178.]

PROCHEIN AMI SUING FOR INFANT.—Any one may sue in an infant's name, without his knowledge or consent, as next friend; but on proper application the court will refer it to a master to ascertain whether the suit is for the infant's benefit, and if he reports that it is not, the proceedings will be stayed. The rule is different as to a suit brought in the name of a *feme-covert*.

INSOLVENT PERSON SUING AS PROCHEIN AMI for an infant will be required, on the defendant's application, to give security for costs.

INFANT SUING IN FORMA PAUPERIS.—Perhaps the court might permit an infant to sue *in forma pauperis*, if unable to indemnify a responsible person for costs; but it would first see that there was probable cause to sue, and appoint a proper person as *prochein ami*.

MOTION on the part of the defendant in a suit brought by an infant, suing by his next friend, to change the *prochein ami*, or stay the proceedings until security for costs was given, on an affidavit that the *prochein ami* was insolvent, and that the suit was commenced without the infant's knowledge or consent.

J. Roosevelt, for the motion. The defendant may have an attachment against the *prochein ami*, or an execution or *ca. sa.* against the infant for costs to which he is entitled: 1 Str. 548; 2 Id. 1217; Barnes, 128; 13 East, 6. Where the *prochein ami* is not responsible, the court will appoint another in his place: 2 Str. 708; for the *prochein ami* being liable for costs, must be a responsible person: 1 Atk. 570; 3 Bac. Abr. 619; Wyatt, 223. An application to change the *prochein ami*, or require security, may perhaps be denied when made after answer, and where the plaintiff is a *feme-covert*: 2 P. Wms. 297.

M. C. Patterson, *contra*, cited *Squirrel v. Squirrel*, 2 Dick. 765; 1 Ves. jun. 409; 2 P. Wms. 297; 1 Str. 708, to show that security for costs can not be required of a bankrupt complainant, and that an indigent *prochein ami* will not be removed.

THE CHANCELLOR. It is not necessary for the person prosecuting a suit in the name of infants, to show that the same was commenced with their knowledge or consent. Any person may bring a suit in their name, as their next friend, because he does it at his peril: *Andrews v. Cradock*, Prec. in Chan. 376. The only check upon this general license is, that on a proper application the court will refer it to a master to inquire whether such suit is for the benefit of the infants; and if the master reports that it is not for their benefit, or that it is not for their interest

that it should be prosecuted by the particular person who has instituted the suit, the court will order the proceedings to be stayed: *Dacosta v. Dacosta*, 3 P. Wms. 140;¹ *Sullivan v. Sullivan*, 2 Meriv. 40. In this respect it differs from a suit brought in the name of a *feme-covert*. Such a suit can not be brought without her consent, and when brought with her consent, the *prochein ami* may be changed on her application, the person substituted giving security for the costs already accrued: *Lady Lawley v. Halpen*, Bunb. 310.

The important question in this case is, whether a person who is insolvent and wholly irresponsible shall be permitted to prosecute in the name of infants, without giving security for the costs to which the defendant may be subjected. In the case of *Squirrel v. Squirrel*, Dickens, 765; S. C., 2 P. Wms. 297, note, cited by the complainants' counsel, Lord Hardwicke refused to stay the proceedings in a suit by a *feme-covert* against her husband, on an affidavit that the *prochein ami* was insolvent; but in that case, the application was not made till after the answer of the defendant was put in; which, of itself, was a sufficient answer to the application for security for costs: 1 Johns. Ch. 202; 3 Id. 520. And Lord Thurlow afterwards intimated that an infant might prosecute by a next friend who was insolvent: Anonymous, 1 Ves. jun. 409. Neither of these cases is binding as authority upon this court. On the contrary, all the cases before the revolution hold a different language. In the case of *Wale v. Salter*, Moseley, 47, the master of the rolls required a *prochein ami* who was insolvent to give security for costs; and it was there said a similar order had been made the preceding day by the lord chancellor. The same principle was afterwards recognized by him in another case, although he refused to require security merely because the next friend was privileged from arrest: Anonymous, Moseley, 86. And in a subsequent case at the rolls, it was held that it was not necessary the next friend should be a relation, only a person of substance, because he was liable for costs: Anonymous, 1 Atk. 570.

Perhaps, in a proper case, on an application to the court, an infant who had no means to indemnify a responsible person for costs, might be permitted to sue by his next friend in *forma pauperis*. I see no objection to such a proceeding, though Lord Eldon intimated it could not be done; but in such a case the court would, in the first place, see that there was probable

1. *Da Costa v. Da Costa*, 3 P. Wms. 140.

cause for the proceeding, and appoint a proper person to prosecute the suit as *prochein ami*.

In this case, the next friend must give security to the defendant to answer the costs of the suit, in such sum and with such sureties as shall be approved of by one of the masters of this court, within thirty days after notice of the order, or the bill must be dismissed; and, in the mean time, all proceedings therein must be stayed until such security is filed.

RECOGNIZED AS AUTHORITY ON THE POINT that an irresponsible party will be required to give security for costs, or his bill will be dismissed: *Bridges v. Canfield*, 2 Edw. Ch. 218; *Wood v. Wood*, 8 Wend. 369; *Hill v. Thaxter*, 3 How. Pr. 409; that the guardian of an infant plaintiff should be a responsible person, because he is liable for costs: *Cook v. Rawdon*, 6 Id. 234; that the next friend of a *feme-covert* acts by her consent: *Heller v. Heller*, 6 Id. 196, and that although no leave of court is necessary, he must be a responsible person: *Towner v. Towner*, 7 Id. 388; *Lawrence v. Lawrence*. 3 Paige, 269.

DE LA VERGNE v. EVERTSON.

[1 PAIGE CH. 181.]

PAYMENT ON A JUDGMENT DISCHARGES ITS LIEN to that extent, and a subsequent agreement of the parties can not restore it.

ASSIGNER OF A JUDGMENT HAS NO BETTER RIGHT against third persons than the assignor.

INTEREST ON JUDGMENT.—Prior to the act of April 13, 1813, interest on a judgment could not be levied, unless it was for a penalty, and the amount, including interest, was within the penal sum.

EQUALITY AMONG CREDITORS is equity.

RESPECTIVE RIGHTS OF JUDGMENT-CREDITORS.—Where land is sold under a mortgage, and there are several creditors having judgments subsequent to the mortgage, the oldest judgment is, as respects the others, no further a lien upon the surplus moneys than it was upon the equity of redemption. Hence, if the judgment-creditors are equitably entitled to interest, but could not have levied it on the land, the money must first be applied to the principal of the judgments, according to priority, and the residue, if any, ratably applied to the interest on said judgments.

PARTY UNNECESSARILY FILING A BILL, without the direction of the court, where he might have had relief by petition in another suit, is not entitled to costs.

DEFENDANT SETTING UP AN UNFOUNDED CLAIM is not entitled to costs.

FUND NOT DISTRIBUTED WHERE ALL PARTIES NOT BEFORE THE COURT.—A fund in court will not be distributed where all the parties interested are not before the court; but the right of the parties before the court, as between themselves, may be decided, if they so wish, without prejudice to the claims of persons interested who were not made parties.

BILL by a defendant in a foreclosure suit against a co-defend-

ant and others, claiming a part of the money made on the foreclosure sale; heard on exceptions to a master's report. It does not appear very clearly what the facts were.

J. Brush, for the complainant.

J. Tallmadge, for the defendants.

The CHANCELLOR. Three hundred dollars having been paid by John De La Vergne on the judgment to Tabor, the lien on the land was discharged to that extent, and could not be restored by any subsequent agreement between the parties: *Marvin v. Vedder*, 5 Cow. 671. The master has properly deducted that sum from the judgment lien upon the land. The assignee of the judgment can have no better equity, as against third persons, than Tabor had before the assignment.

Previous to the act of the thirteenth of April, 1813, the plaintiff could not levy interest on a judgment, except it was on a penalty, and the amount ordered to be levied, including the interest, was within the penal sum. In *Watson v. Fuller*, 6 Johns. 283, the supreme court decided, even where a judgment was reduced by payments, that the plaintiff could not levy interest, although within the nominal amount of the original judgment. And in *Mason v. Sudam*, 2 Johns. Ch. 172, Chancellor Kent held that a judgment recovered previous to April, 1813, was not a lien on mortgaged premises for the interest, as it could not be levied under an execution.

As between different creditors, equality is equity; and if there are several judgment-creditors, and the land is sold under a prior mortgage, the holder of the first judgment, as against the others, has no greater lien upon the surplus moneys than he had upon the equity of redemption before the sale. If the judgment-creditors are equitably entitled to interest as against the debtor, but have no right to levy it on their executions against the land, the principal of their judgments must be paid out of the fund, according to their order of priority, and if anything remains, it may be applied to the payment of interest on the several judgments ratably. The master was, therefore, right in not casting interest on the Tabor judgment previous to the sale under the mortgage.

The complainant has unnecessarily filed a bill in the cause, without the direction of the court, when he might have settled these questions by a petition in the original suit for an equitable distribution of the surplus moneys; he is, therefore, not entitled to costs. Evertson, having set up an unfounded claim to the

whole amount of the Tabor judgment and the interest, is equally in fault. As the assignee of the Schuyler judgment is not before the court, no decree can be made in this cause for the distribution of the fund. The bill ought, therefore, to be dismissed without prejudice to the rights of the parties to petition, in the original suit, for an equitable distribution of the surplus. But as the parties have expressed a wish that their rights might be decided in this suit, as between themselves, there must be a decree confirming the report of the master, and declaring the rights of the parties on the principles above stated, and without prejudice to the rights of the owner of the Schuyler judgment, and leaving them to apply by petition for the surplus moneys, agreeably to their rights as thus declared, when the claim of the other party in interest can be examined and settled.

THAT INTEREST ON A JUDGMENT IS NOT A LIEN on the debtor's land, this case is cited in *Mower v. Kip*, 2 Edw. Ch. 171; S. C., 6 Paige, 91.

JUDGMENT ONCE PAID CAN NOT BE REVIVED by a subsequent agreement of the parties: *Averill v. Loucks*, 6 Barb. 22; *Winslow v. Clark*, 2 Lans. 380, citing the principal case. It is referred to as authority, also, on the point that where land, which is subject to liens, is sold, the liens are transferred to the proceeds: *Averill v. Loucks*, 6 Barb. 478.

IN THE MATTER OF THE FRANKLIN BANK.

[1 PAIGE CH. 249.]

SPECIAL DEPOSIT IN A BANK is at the risk of the depositor, but if money so deposited is converted to the general purposes of the bank by its officers or agents without the depositor's consent, they are personally liable to him, and he may follow such money into the hands of third persons receiving it with a knowledge of his rights, or not having paid an equivalent therefor in the ordinary course of business.

GENERAL DEPOSITS become the property of the bank, and may be employed in its business.

GENERAL DEPOSITOR, THEREFORE, IS MERELY A GENERAL CREDITOR of the bank, and is not entitled to any priority of payment over other creditors in case of bankruptcy.

MOTION on behalf of the depositors in the Franklin Bank for an order on the receiver to pay the amount of their deposits before making distribution among the general creditors. The facts are stated in the opinion.

D. B. Ogden, for the motion. A deposit is a trust confided to the directors of the bank, they being the trustees, and he the *cestui que trust*. The depositor is not a mere lender, there-

fore. He is entitled to the execution of the trust so confided to the directors; by being repaid the amount of his deposit whenever he draws for it. Nor does it matter in equity whether the deposit consists of plate, or of money kept in a separate bag, or of money deposited generally. In either case the deposit is for safe-keeping and not for profit, and is not intended to be incorporated into the funds of the bank. The bank's creditors, therefore, have no right to payment out of such deposits, for they are not assets. It is like the case of property of a principal in an agent's hands which the latter has no right to pledge for his individual debt: *Bay v. Coddington*, 5 Johns. Ch. 54 [9 Am. Dec. 268]; *Rodriguez v. Heffernan*, Id. 417. So, on an execution against a miller, wheat belonging to a customer, though mixed with the miller's, can not be sold: *Seymour v. Brown*, 19 Johns. 44.

S. A. Foot, contra. The statute under which these proceedings are had disposes of the question by requiring an equal distribution of the funds of the bank among its fair and honest creditors. Equality of payment among creditors is also a rule of equity, and of the English bankrupt law. The depositors are not entitled to any preference. They made their deposits with an implied assent to the use of them by the bank. They derive a profit through the security afforded them against fire and robbery, and also through the facilities which they expect and receive from the bank in the way of loans. The bill-holders receive the notes of the bank on the credit of the deposits. The only way that the depositor can obtain a preference is to seal up his money in a package. By allowing his money to be mingled generally with the funds of the bank, so that it can not be traced specifically, he permits it to become a part of the assets of the bank to be distributed *pari passu* among the creditors.

The CHANCELLOR. By the report of the receiver it appears that at the time he took the concerns of the bank into his hands, the amount of moneys actually remaining in deposit, including the bills of other solvent banks, was only seven thousand nine hundred and fifty-seven dollars and eighty-eight cents, while the amount of balances on the books of the company, standing to the credit of individuals and other banks, usually denominated deposits, was two hundred and fifty thousand six hundred and seventy-one dollars; of which sum eighty-four thousand dollars was due to other banks. This amount

of deposits has been reduced by offsets, etc., about thirty-five thousand dollars, leaving the estimated amount of debts due from the bank, three hundred and forty thousand dollars, of which one hundred and twenty-five thousand dollars belongs to bill-holders, and the residue to depositors. It is supposed the assets of the bank will not be sufficient to pay more than fifty per cent. on the gross amount of such debts. The depositors claim a priority of payment; and if that claim is allowed, they will obtain about eighty per cent. of their debts, and the bill-holders will receive nothing. The receiver, as the representative of all parties in interest, has very properly submitted the claims of the bill-holders, who are numerous and widely dispersed, to an equal share of what may be saved from the wreck of the institution. The question has been fully and ably argued on both sides, and I have given to the subject the consideration which was demanded by the importance of the principles involved therein. Many cases of extreme hardship and of great individual distress and suffering must exist among every class of creditors, and even among the stockholders. The misfortune of every failure of this kind is, that the loss generally falls upon those who are least able to bear it, upon the laboring class of the community; upon the aged and infirm, the friendless and unprotected, whose little all is holden in bills, left in deposit or vested in the stock of such institutions. But cases of individual hardship must not be permitted to influence the opinion of the court when deciding great general principles.

The first question presented for consideration is, whether the depositors have a legal right or equitable claim to priority of payment; and certainly, at the first blush, it does appear reasonable that those who have deposited their money in a bank for safe-keeping should be preferred to those who have taken the bills of the institution in the ordinary course of business. It therefore becomes necessary to examine the principle on which this supposed right of preference is founded. It is undoubtedly supposed to be based upon the great and leading principle of equity, that the property of one person, in the hands of a bankrupt, shall not be taken to pay the debts of another. It is on this ground that the property of the principal in the hands of agents or factors can not be taken to satisfy the debts of the latter, and the former has a right to claim the proceeds of his property so long as it can be traced and identified: 5 Johns. Ch. 417; 5 Ves. jun. 211. It is, therefore, necessary for the decision

of this question to ascertain the nature of these deposits and see whether they come within this principle.

So far as I have been informed on the subject of banking operations, the greatest portion of the debts of a bank, usually denominated deposits, are not moneys actually deposited there for safe keeping. If such was the case, the depositor could always guard against the effect of an insolvency of the institution by making a special deposit; that is, by depositing his money in a bag or box, or by affixing some mark upon it, by which it could be distinguished from the general funds of the institution. If he did so, the bank would have no right to make use of it, and officers or agents who should convert it to the general purposes of the institution, without the consent of the depositor, would make themselves personally liable for the same. The depositors might also follow the money into the hands of third persons who had received it with a knowledge of his rights, or who had not paid an equivalent therefor in the ordinary course of business: *Coddington v. Bay*, 20 Johns. 637 [11 Am. Dec. 342]. Every regular dealer with a bank has an open running account upon the books of the institution. In this account he is credited with all sums paid by him into the bank, whether the same are in specie, in checks, or in bills, on the same or other banks. In that account he is also credited with the proceeds of bills or notes discounted or collected for him; and in the same account he is charged with all checks drawn by him on the institution, in favor of himself or others, and with all other claims which are properly chargeable against him by the bank. If there is a balance due to the bank on this account, it is called an over-drawing, and the aggregate of balances due from the bank on these several accounts, is entered in the statement book as the amount of deposits.

Hence, it sometimes happens that a person becomes a depositor in a bank without adding one cent to the funds. Thus, if the officers of the bank permit one of their customers to overdraw his account, and the check is placed to the credit of another, the latter becomes a depositor, although the drawer of the check is insolvent and unable to pay his overdrawn. And on the principle of preference contended for here, if another person had at the same time deposited an equal amount of specie and taken bills of the bank in lieu thereof, such depositor of a worthless check would be entitled to the whole of that specie to the exclusion of the bill-holder who had actually deposited the same.

Whenever money is specially deposited in a bank for safe

keeping, it is at the risk of the depositor. If the same is stolen, lost, or destroyed without any fault on the part of the officers of the bank, he must sustain the loss. Not so with the general depositor. The money, checks, or bills which he deposits become the property of the bank, and he becomes a creditor. If they are stolen, lost, or destroyed, or become of no value, the bank sustains the loss, and he is still a creditor. He has no claim upon the money or bills deposited, the officers may use them as they please for the general purposes of the institution, and he is to all intents a general creditor of the bank. There is an implied assent on the part of the depositor, and the agents of the institution are legally authorized to issue bills and discount notes on the credit of such deposits. The depositor, therefore, has no valid claim to be paid in preference to the bill holders, who are also general creditors.

One of the leading doctrines of this court is, that equality is equity; and in all cases of bankruptcy, the creditor who claims a preference must show a legal right to, or a specific lien upon, the fund claimed. The injustice of giving the depositors a preference over the bill-holders is strongly exemplified in the case before me. But a very small portion of the fund to be distributed could possibly have been the proceeds of deposits in the bank. The money found therein did not exceed one twenty-fifth part of the amount due to depositors. And a very considerable part of the fund to be distributed will arise from the sale of real estate purchased many years since, probably with a part of those very bills which were in circulation when the bank stopped payment.

Having arrived at the conclusion that the depositors have no legal or equitable claim to priority of payment, it becomes unnecessary to examine the question whether the act of April, 1825, requires an equal distribution of the property and effects of the institution among all the creditors; it is sufficient on this subject to observe, that the section under which the proceedings in this case have been instituted, gives no preference to any class of creditors; and the only section of the act which prescribes the manner of distributing the effects of an insolvent corporation directs an equal distribution.

I shall therefore decree an equal distribution of the assets among all the creditors of the Franklin Bank, and shall direct the receiver to make the first dividend as soon as he shall be able to divide twenty-five per cent. on the gross amount of the debts.

DEPOSITS IN A BANK ARE EITHER GENERAL OR SPECIAL, and the rights and liabilities of the parties with respect to the two classes are entirely different. A general deposit is one which is to be repaid on demand, in money. A special deposit is where the depositor is entitled to the return of the identical thing deposited. *Prima facie*, every deposit is general: *Brahm v. Adkins*, 77 Ill. 263. It is not special unless clearly made so by the depositor, even though he himself may hold it in a particular capacity and for a special purpose. Hence, where one with whom money is left to pay certain notes deposits it in a bank for his own convenience, it is a general deposit: *Keene v. Collier*, 1 Met. (Ky.) 415.

GENERAL DEPOSIT IS A LOAN.—It is a settled rule of the law of banking that a general deposit is, in effect, a loan, creating the relation of debtor and creditor, and imposing on the banker, as debtor, the obligation of repaying the debt as a whole or in installments, as the depositor, or creditor, may call for it by his checks: *Walker's Treatise on Banking Law*, 28; *Morse on Banking*, 28; *Grant on Banking*, 1; *Foley v. Hill*, 2 H. of L. Cas. 28; *Carr v. Carr*, 2 Meriv. 541; *Devaynes v. Noble*, Id. 569; *Pott v. Clegg*, 16 Mees. & Wels. 321; *Sims v. Bond*, 2 Nev. & Man. 608; S. C., 6 Barn. & Ald. 392; *Watts v. Christie*, 11 Beav. 546; *Garnett v. McKewan*, L. R. 8 Exch. 10; S. C., 4 Eng. Rep. (Moak's Notes) 419; *Goodwin v. Roberts*, L. R. 10 Exch. 351; *Corbit v. Bank of Smyrna*, 2 Harr. (Del.) 235; *Coffin v. Anderson*, 4 Blackf. 395; *Marsh v. Oneida Central Bank*, 34 Barb. 298; *Ætra National Bank v. Fourth National Bank*, 46 N. Y. 82; S. C., 7 Am. Rep. 314; *Wray v. Tuskegee Insurance Co.* 34 Ala. 58; *Robinson v. Gardiner*, 18 Grat. 509; *Bank of Northern Liberties v. Jones*, 42 Pa. St. 536; *Boyden v. Bank of Cape Fear*, 65 N. C. 13; *Knecht v. United States Savings Inst.*, 2 Mo. App. 563; *Bank of the Republic v. Millard*, 10 Wall. 152. The money becomes the property of the depository: *Marsh v. Oneida Central Bank*, 34 Barb. 298. And the depositor's claim is a mere chose in action: *Lund v. Seamen's Bank*, 37 Id. 129; *Chapman v. White*, 6 N. Y. (2 Seld.) 412. The bank may use the money as it will, and may, without the depositor's consent, apply it to any past due debt which it may hold against him: *Carr v. National Security Bank*, 107 Mass. 45; *Commercial Bank v. Hughes*, 17 Wend. 94; *Marsh v. Oneida Central Bank*, 34 Barb. 298. In *Downes v. Phoenix Bank*, 6 Hill, 297, it is said that such a deposit is in the nature of a *mutuum*, or loan for consumption. It is impressed with no trust in favor of the depositor, and there is no fiduciary relation, no relation of *cestui que trust* and trustee between him and the banker: *Carr v. National Security Bank*, 107 Mass. 45; *Buchanan Farm Oil Co. v. Woodman*, 1 Hun. 639; S. C., 4 Thomp. & C. 193; *In re Bank of Madison*, 5 Biss. 515.

A leading case on this subject is that of *Foley v. Hill*, 2 H. of L. Cas. 28, above referred to, where it was held that because there was no fiduciary relation between the parties, a bill in equity would not lie in favor of the depositor against the banker to adjust the account between them when such account was neither long nor complicated. Lord Chancellor Cottenham said: "Money, when paid into a bank, ceases altogether to be the money of the principal. It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom

of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situation of banker and customer, the banker is not an agent or factor, but he is a debtor."

Said Lord Brougham, in the same case: "Now, as to the banker: is his position with respect to his customers that of a trustee with respect to a *cestui que trust*? Is it that of a principal with respect to an agent? or that of a principal with respect to a factor? I see no ground for contending that there is any identity in those two points. I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon, or of receiving money from other parties to the credit of his customer, upon like conditions to be drawn out by the customer; or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. But even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money, and to pay it back, as a mere depositary of the principal. But he receives it to the knowledge of his customer, for the express purpose of using it as his own, which if he were a trustee he could not do without a breach of trust. It is a totally different thing if we are to take into consideration certain acts that are often performed by a banker, and which put him in a totally different capacity, for he may, in addition to his position of banker, make himself an agent or a trustee towards a *cestui que trust*; for example, suppose I deposit exchequer bills with a banker, and he undertakes to receive the interest upon them, or undertakes to negotiate or make sale of those exchequer bills, and to credit my account with the proceeds of the sale, I do not stay to ask whether in that case he might not be in the position of a trustee, and might not partly sustain a fiduciary character; but he does that incidentally to his trade of a banker; for his trade of a banker is totally independent of that—his trade of a banker consists in the general trade to which the other is an accidental addition. This trade of a banker is to receive money, and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor."

Equally explicit is the language of Davis, J., delivering the opinion of the supreme court of the United States, in *Bank of the Republic v. Millard*, 10 Wall. 152, where he says: "It is no longer an open question in this court, since the decision in the cases of *Marine Bank v. Fulton Bank*, 2 Wall. 252, and of *Thompson v. Riggs*, 5 Id. 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other

money. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Campbell, in the house of lords, in the case of *Foley v. Hill*, 2 Cl. & Fin. 28, and they all concurred in the opinion, that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect."

DEPOSITOR'S REMEDY IS BY ACTION.—It follows from the fact that a deposit is a mere loan, that the remedy for its recovery is by action: Grant on Banking, 3; unless, as intimated in *Foley v. Hill*, 2 H. of L. Cas. 28, there should be a long and complicated account to adjust, or unless there should be some other special and peculiar reason for applying to a court of equity for relief.

DEMAND NECESSARY BEFORE SUIT.—Since a general deposit is a loan which the banker is obliged to pay when called upon by the draft of the customer, it is clear that there can be no default, and, consequently, no action will lie to recover the deposit until the payment has been demanded and refused: *Adams v. Orange County Bank*, 17 Wend. 514; *Downes v. Phoenix Bank*, 6 Hill, 297; *Johnson v. Farmers' Bank*, 1 Harr. (Del.), 117; *Watson v. Phoenix Bank*, 8 Met. 217; *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; *Brahm v. Adkins*, 77 Ill. 263. But if the bank has stopped payment no demand is necessary: *Watson v. Phoenix Bank*, 8 Met. 217. So a demand is unnecessary where the depositor has been notified that his claim will not be paid: *Farmers' Bank v. Planters' Bank*, 10 Gill & J. 422; or where the bank has rendered an account claiming the money as its own: *Bank of Missouri v. Benoist*, 10 Mo. 519.

STATUTE OF LIMITATIONS RUNS AGAINST DEPOSITOR'S CLAIM.—A general deposit being a mere debt, owing from the banker to the depositor, the statute of limitations applies to it as to any other debt: Walker's Treatise on Banking, 33; Grant on Banking, 3; Morse on Banking, 39; *Pott v. Clegg*, 16 Mees. & W. 321. The statute begins to run from the time a demand is made: *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; *Planters' Bank v. Farmers and Mechanics' Bank*, 8 Gill & J. 449. But it was held in *Union Bank v. Knapp*, 15 Am. Dec. 181, that where a balance is struck between the banker and depositor every month, the statute begins to run from the time such balance is struck. In case of the suspension of the bank the statute runs from the time the suspension is known to the depositors: *Union Bank v. Planters' Bank*, 9 Gill & J. 439.

DEPOSITOR INDEBTED TO BANK—SET-OFF.—Where a depositor is indebted to the bank and the debt is due, a mutual right of set-off exists; that is to say, the depositor may set off his deposit against the debt, and the bank may set off the debt against the claim for the deposit. And where the bank becomes insolvent and a receiver is appointed, or its assets are placed in the hands of commissioners for liquidation, the depositor may still set off his deposit against his indebtedness: *Matter of Van Allen*, 37 Barb. 225; *Receiver of the New Amsterdam Savings Bank v. Tartter*, 54 How. Pr. 385; *Coll v. Brown*, 12 Gray, 233; *Clarke v. Hawkins*, 5 R. I. 219; *Finnell v. Nesbit*, 16 R. Mon. 351; *Platt v. Bentley*, 11 Am. L. Reg. 171. And where a depositor is

indebted to the bank on a note, and before the note is due the banker makes an assignment for the benefit of creditors, the depositor may insist that the note be paid out of the deposit: *McCagg v. Woodman*, 28 Ill. 84. So where the note falls due a few days after the receiver is appointed, and it has been the custom of the bank to apply the deposits of its customer to his notes as they fall due, it is the duty of the receiver to pay the note out of the deposit: *Jones v. Robinson*, 26 Barb. 310. But partners indebted to a bank on their joint account can not set off a separate deposit in the same bank assigned to them by one of their firm after the bank has stopped payment: *Watts v. Christie*, 11 Beav. 546.

On the other hand, if the depositor should become bankrupt, his deposit stands as a security for his indebtedness to the bank: *Ex parte Howard National Bank*, 16 Nat. Bank. Reg. 420. Where the depositor becomes insolvent after the bank has discounted his note, it may deduct the amount of the note from his deposit, and pay the balance to the assignee: *Denmon v. Boylston Bank*, 5 Cush. 194. Where a depositor died indebted to the bank on a judgment, and also on a simple contract, it was held that the bank might, independently of the statute of set-off, apply the balance of the deposit to the simple debt: *State Bank v. Armstrong*, 4 Dev. L. 519. On the death of a depositor whose note the bank has discounted for his accommodation, if his estate proves insolvent, and the note is not yet due, the bank may retain the deposit to meet the note: *Ford v. Thornton*, 3 Leigh, 695; *Knecht v. U. S. Savings Institution*, 2 Mo. App. 563.

Where the maker of a note which has been discounted by a bank has funds on deposit in the bank at the maturity of the note sufficient to pay the same, and fails to apply it to such note, it is held in *Dawson v. Real Estate Bank*, 5 Ark. 283, that the indorser is thereby discharged. So where funds of the maker sufficient to pay the note were on deposit in the bank after judgment against the indorser, it was held in *McDowell v. Bank of Wilmington*, 1 Harr. (Del.) 369, that upon the failure of the bank to apply such funds to the debt, it would be restrained from enforcing the judgment. But it was held in *National Bank of Newburgh v. Smith*, 66 N. Y. 271; S. C., 23 Am. Rep. 43, that, where after a note discounted by the bank had been duly protested for non-payment, the maker placed funds on deposit in the bank sufficient to meet the note, the indorser was not thereby released, because it was in the option of the bank to apply the deposit as a payment or not. So it was decided in *Voss v. German-American Bank*, 83 Ill. 599; S. C., 25 Am. Rep. 415, that the omission of a bank to apply a deposit of the principal in a note to the payment of such note does not discharge the surety. Where a bond is given by a depositor for advances from time to time, the subsequent increase of his deposits beyond the amount of the bond does not operate as a payment of it, but it remains as a continuing security: *Henniker v. Wigg*, 4 Q. B. (Ad. & El. N. S.) 792.

DEPOSITS PAYABLE IN WHEAT.—Another result of the principle, that a deposit is a loan or debt, is, that it is payable, like other debts in money, without discount, even though the deposit was made in bank bills which subsequently became depreciated: *Marine Bank v. Chandler*, 27 Ill. 525; *Marine Bank v. Birney*, 28 Id. 90; *Marine Bank v. Rushmore*, Id. 463; *Willotts v. Paine*, 43 Id. 432; *Bank of Kentucky v. Wister*, 2 Pet. 318; *Marine Bank v. Fulton Bank*, 2 Wall. 252. So where the bank whose notes are deposited afterwards stops payment: *Corbit v. Bank of Smyrna*, 2 Harr. (Del.) 235. In *Bank of Kentucky v. Wister*, 2 Pet. 318, where bank notes were deposited which were at the time current at half their face value, and a certificate of

deposit was given for them at their nominal value, it was held that the bank was liable according to the tenor of the certificate in money. But where a deposit was made in confederate currency, it was held that the depositor was entitled to receive good money only to the value of the currency at the time of the deposit: *Dabney v. Bank of the State*, 3 S. C. 124. So in *Boyd v. Bank of Cape Fear*, 65 N. C. 13. On the other hand, it was held in *Foster v. Bank of New Orleans*, 21 La. An. 338, that a deposit in confederate currency, which was bankable money at the time, could not be collected in good money. Undoubtedly where a deposit is made in anything else than money, its value in money at the time of the deposit is the correct measure of the amount of the loan. It is a further incident of the doctrine, that a deposit is simply a debt, that, although it was made in gold, it will be payable in other lawful money, as in legal tender notes: *Sandford v. Hays*, 52 Pa. St. 28; *Gumbrel v. Abrams*, 20 La. An. 568; *Thompson v. Riggs*, 5 Wall. 663. But if the deposit is made in gold, with a special agreement that it is to be paid in gold, it must be so paid: *Kupfer v. Bank of Galena*, 34 Ill. 328; *Chesapeake Bank v. Swain*, 29 Md. 483.

REFUSING TO HONOR CHECK—RIGHT OF HOLDER OF CHECK TO SUE.—Undoubtedly, where a bank refuses to honor its depositor's check, if he has funds on deposit sufficient to meet it, an action will lie in his name. So, even though he has sustained no actual damage: *Marzetti v. Williams*, 1 Barn. & Ald. 415. So where the bank is directed to apply a deposit to the payment of a note of the depositor and neglects or refuses to do so, the depositor may sue, but not the payee: *Pease v. Warren*, 29 Mich. 9.

But although the depositor's right of action in such cases admits of no question, there is much diversity of opinion as to the right of the holder of a check drawn by a depositor to sue for the amount of it, if not paid, and if the depositor's balance in the bank is sufficient to meet it. It is held in very many, if not in a majority, of the cases, that there is no privity between the holder of the check and the bank until the check is presented and accepted, and that the check does not operate as an equitable assignment of the deposit, or impose any liability upon the bank to pay to such holder: *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Caldwell v. Merchants' Bank*, 26 U. C., C. P. 294; *Lamb v. Sutherland*, 37 U. C., Q. B. 143; *Bank of the Republic v. Millard*, 10 Wall. 152; *Dana v. Third National Bank*, 13 Allen, 445; *Carr v. National Security Bank*, 107 Mass. 45; S. C., 9 Am. Rep. 6; *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82; S. C., 7 Am. Rep. 314; *Case v. Henderson*, 23 La. An. 49; S. C., 8 Am. Rep. 590; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *National Bank v. Whitman*, 94 U. S. 343.

The principle upon which these cases proceed is well stated by Davis, J., delivering the opinion of the court in *Bank of the Republic v. Millard*, 10 Wall. 152, where he says: "On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be

compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge (Gardiner, J., *Chapman v. White*, 2 Seld. 417), is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the consent of the depository. This is a well-established principle of law, and is sustained by the English and American decisions: *Chapman v. White*, 2 Seld. 412; *Butterworth v. Peck*, 5 Bos. 341; *Ballard v. Randall*, 1 Gray, 605; *Harker v. Anderson*, 21 Wend. 373; *Dykens v. Leather Mfg Co.*, 11 Paige, 616; *National Bank v. Eliot Bank*, 5 Am. L. Reg. 711; Para. on Notes and Bills (ed. 1863), 59-61, and notes; Parke, B., in argument in *Bellamy v. Majoribanks*, 8 Eng. L. & Eq. 522, 523; *Wharton v. Walker*, 4 Barn. & Cress. 163; *Warwick v. Rogers*, 5 Man. & G. 374; Byles on Bills, ch. 'Check on Banker;' Grant on Banking (Lond. ed. 1856), 96."

But there are authorities holding a different view. They, however, do not proceed upon any different understanding of the relation between banker and depositor. They, too, recognize that relation as one of debtor and creditor. They, too, hold that there is an implied obligation on the part of the banker to repay the deposit when demanded or as demanded; but they go farther, and from the fact that there is a usage among banks to pay such checks on demand, and that this is known to all who receive checks from depositors, they infer that every holder of a check, as soon as he receives it, becomes a party to the implied contract, which inures to his benefit. They, therefore, hold that such a check operates as an equitable assignment of so much of the deposit, and transfers it to the holder upon presentment, if the funds are still there; and that consequently he may sue without waiting for a promise to pay the check: *Munn v. Burch*, 25 Ill. 35; *Fourth National Bank v. City National Bank*, 68 Id. 398; *Fogarties v. State Bank*, 12 Rich. (S. C.) 518; S. C., 8 Am. L. Reg. 393; *Roberts v. Corbin*, 26 Iowa, 321; *Lester v. Given*, 8 Bush, 357; *McGrade v. German Savings Institution*, 4 Mo. Ap. 330; *Zelle v. German Savings Institution*, Id. 401. The doctrine upon which this class of decisions is founded, is well stated in *Munn v. Burch*, 25 Ill. 35, where the court say: "The check of a depositor, upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, which may again be transferred to another by delivery, and when presented to the banker he becomes the holder of the money to the use of the check, and is bound to account to him for that amount, provided the party drawing the check has funds to that amount on deposit, subject to his check at the time it is presented."

In *Fourth National Bank v. City National Bank*, 68 Ill. 398, it appeared that a bank having discounted a note for a certain person, the latter deposited the proceeds in the bank. Afterwards he drew a check on the deposit, which the bank refused to pay, claiming a lien on the deposit to meet the note, the maker having at the time filed his petition in bankruptcy and subsequently gone into bankruptcy. The court held that the bank had no lien on the deposit, and that the holder of the check could maintain an action for the recovery of the amount thereof.

SPECIAL DEPOSITS.—The liability of banks for special deposits is of a very different character from that which exists in the case of general deposits. A special deposit is, ordinarily, a mere bailment without hire. The bailee is bound to restore the identical thing deposited, and is bound to take care

of it while it is in his keeping, that is to say, such care as an ordinarily prudent man takes of his own property of the same kind; and he is liable for gross negligence: *Foster v. Essex Bank*, 9 Am. Dec. 168, and note; *Giblin v. McMullen*, 38 L. J. P. C. 25; S. C., 17 W. R. 445; 2 L. R. P. C. 317; 21 L. T. N. S. 214; *Ray v. Bank of Kentucky*, 10 Bush, 344; *Scott v. National Bank of Chester Valley*, 72 Pa. St. 471; *Scott v. Crews*, 2 S. C. 522; *Boyden v. Bank of Cape Fear*, 65 N. C. 13. So, where the deposit is received by the cashier of a national bank not authorized by its charter to take such deposits, but where it has been in the habit of receiving them: *Chattahoochee National Bank v. Schley*, 58 Ga. 369; *First National Bank of Carlisle v. Graham*, 9 Reporter, 533, in the United States supreme court on appeal from the decision of the same case in 79 Pa. St. 106. But the bank is not liable in such a case unless there has been a special authority to the cashier or a custom to receive such deposits: *First National Bank v. Ocean National Bank*, 60 N. Y. 273. In *Hale v. Rawallie*, 8 Kans. 137, it was held that in the case of a special deposit without compensation, a bank is bound only to "slight" care, and liable only for gross negligence, and, therefore, that where valuable securities were deposited in the bank safe, but not in the vault, and were stolen, the bank was not liable.

DEPOSIT FOR A SPECIAL PURPOSE.—Where a customer deposited a sum of money with written instructions to the bank to forward five hundred pounds to another bank to meet bills about to become due, and the money was sent as directed, but before the bills became due the bank in which the deposit was originally made ceased business, it was held that the money so specifically appropriated belonged to the customer and not to the creditors of the bank: *Farley v. Turner*, 26 L. J. Ch. 710. Where bills not due are deposited with a banker he is constituted an agent for collection, and in case of his becoming bankrupt the depositor may recover the bills: *Giles v. Perkins*, 9 East, 12. In the case of bonds deposited in a bank under a special agreement to exchange them for other bonds, the bank is not regarded as a bailee without compensation, but is liable on its special contract: *Leach v. Hale*, 31 Iowa, 69. And in such a case, it seems, the bank has no lien on the securities so deposited for the security of a debt owing from the depositor: *United States Bank v. Macalester*, 9 Pa. St. 475; *Brandao v. Barnett*, 12 Cl. & Fin. 787.

DEPOSITS IN SAVINGS BANKS.—Where a savings bank is conducted solely for the benefit of the depositors, the deposits constituting its only capital, and the income from interest, etc., after deducting expenses, being divided among the depositors, the relation between them and the bank is clearly not that of debtor and creditor, but more nearly that of trustee and *cestui que trust*. All savings banks are not of this kind, but this is the primitive model of such institutions. Says Grant, in his work on banking law, *Grant on Banking*, 546: "A savings bank is defined to be an institution, in the nature of a bank, formed or established for the purpose of receiving deposits of money, for the benefit of the persons depositing, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors, or administrators, at compound interest, and to return the whole or any part of such deposits, and the produce thereof, to the depositors, their executors, or administrators, deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution, but deriving no benefit whatsoever from any such deposit or the produce thereof."

Such a bank is not, however, a mere charitable society or eleemosynary institution, but a business corporation: *West's Appeal*, 64 Pa. St. 186; *Hunting-*

ton v. National Savings Bank, 96 U. S. 388; S. C., 5 Reporter, 577. It is engaged in the business of banking, and subject to tax as a bank: *Bank for Savings v. Collector*, 3 Wall, 495; *Coite v. Society of Savings*, 32 Conn. 173. The nature and functions of such an institution are very well defined in *Huntington v. National Savings Bank*, 96 U. S. 388; S. C., 5 Reporter, 577. In that case a special act was passed incorporating certain persons as a savings bank, and declaring the object of the institution to be that it might "receive on deposit, for the use and benefit of the depositors, all sums of money offered for that purpose," and that it might invest the same as prescribed by the act, "the income or interest of all deposits" to be "divided among the depositors or their legal representatives according to the terms of interest stipulated," and requiring annual reports to be made to congress. The bill was filed in that case by the administrator of one of the original corporators, claiming that he was a stockholder in the corporation, and praying an account and division of profits. Strong, J., delivering the opinion of the court, after remarking that the charter did not authorize the creation of any corporate stock or capital other than the deposits, or require the corporators to contribute anything, or provide for any dividends among them, proceeded as follows: "We think the complainants have mistaken the nature of the corporation. It is not a commercial partnership, nor is it an artificial being, the members of which have property interests in it; nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depository for the money of those members of the community disposed to trust their property to its keeping. It is somewhat of the nature of such corporations as church wardens, for the conservation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advantage without any interest in its members. The title of the act incorporating it indicates its purpose, namely, an act to incorporate a national savings bank, and the only powers given to it were those we have mentioned, powers necessary to carry out the only avowed purpose, which was to enable it to receive deposits for the use and benefit of depositors, dividing the income or interest of all deposits among its depositors or their legal representatives. It is like many other savings institutions incorporated in England and in this country during the last sixty years, intended only for provident investment, in which the management and supervision are entirely out of the hands of the parties whose money is at stake, and which are *quasi* benevolent and most useful, because they hold out no encouragement to speculative dealing or commercial trading. This was the original idea of savings banks: Scratchley's Treatise on Savings Banks, *passim*; Grant's Law of Bankers, 571, where, in defining savings banks, it is said the bank derives no benefit whatever from any deposit or the produce thereof. Such are savings banks in England, under the statutes of Geo. IV., c. 92, sec. 2, and 26 and 27 Victoria, c. 87. Very many such exist in this country. Among the earliest are some in Massachusetts, organized under a general law passed in 1834, which contained a provision like the one in the act of congress. that the income or profit of all deposits shall be divided among the depositors, with just deduction of reasonable expenses. They exist, also, in New York, Pennsylvania, Maine, Connecticut, and other states. Indeed, until recently, the primary idea of a savings bank has been that it is an institution in the hands of disinterested persons, the profits of which, after deducting the necessary expenses of conducting the business, inure wholly to the benefit of the depositors in dividends, or in a reserved surplus for their greater security. Such, very plainly, is the de-

defendant corporation in this case." The relief prayed for was, therefore, denied.

Savings banks organized and operating under the general laws of Connecticut belong to this class. The statutes of that state contain the following provision with respect to such banks, Gen. Stat. Rev. (1875), 292, sec. 9: "The net income actually earned by any savings bank shall be semi-annually divided among its depositors, to an amount not to exceed six per cent. a year on their deposits. The surplus above this amount, reserving not less than three, nor more than five per cent. of the whole amount of deposits, as a contingent fund, of which their banking-houses, fixtures, and furniture shall form a part, shall be divided as an extra dividend whenever it shall equal one per cent. of the deposits then entitled to a dividend."

Under this statute it is held that deposits in savings banks are not stock in the corporation, but "money put into the hands of trustees to be loaned out:" *Savings Bank v. New London*, 20 Conn. 111. Such corporations "have no stock and no capital. They are, in fact, large incorporated agencies for receiving and loaning money on account of its owners:" *Coite v. Society for Savings*, 32 Id. 173. If there is a gain of interest it inures to the benefit of the depositors in proportion to the amount of their deposits. On the other hand, if there is a loss, each must bear his share of it. Hence, in case of the insolvency of the bank a depositor can not set off his deposit against a debt, owing to him from the bank, for this would be to permit him to escape his proportion of the loss: *Osborne v. Byrne*, 43 Id. 155; S. C., 21 Am. Rep. 641. And where a loss has occurred which the directors have apportioned among the depositors, no depositor can escape his share of the burden, and recover the full amount of his deposit: *Bunnell v. Collinsville Savings Society*, 38 Conn. 203; S. C., 9 Am. Rep. 380. In the case last cited, Park, J., delivering the opinion of the court, used the following language: "We think the facts found by the court below clearly show that judgment should be rendered for the defendant. In the case of *Coite v. Society for Savings*, 32 Conn. 173, the court say that saving societies 'are, in fact, large incorporated agencies for receiving and loaning money on account of their owners. They have no stock and no capital. * * * They are merely places of deposit, where money can be left to remain or be taken out, at the pleasure of the owner.' Their assets consist in loans of money made by them for the benefit of their depositors, from whom the money was derived. In case of loss they have no property out of which it can be paid, and if the claim of the plaintiff is correct, these institutions would have to go into insolvency, and wind up their affairs whenever a loss occurs, however small it may be, in which case depositors would have to bear their proportion of the loss."

It is undeniable, however, that even where a savings bank has no capital beyond its deposits, which it is the purpose of the institution shall be divided equally among depositors, the by-laws may be so framed as to modify the contract, so that, notwithstanding the fact that a loss has occurred, the depositor may recover the whole amount of his deposit. Thus, in *Makia v. Savings Institution*, 23 Me. 350, it appeared that the by-laws provided that two per cent. should be paid twice a year on deposits, "that although four per cent. is promised, yet every fifth year all the extra income which has not before been paid out and divided will then be divided in just proportion to the length of time the money has been in, according to the by-laws," and that "as people may become sick, or otherwise want their money after they have put it in, it is provided that they may take it out when they please, but the days of taking it out are the third Wednesdays in January, April, July, and October," after one week's notice. There was a further provision

in the by-laws that the trustees might "at any time divide the whole of the property among the depositors according to their respective interests therein." A loss of one half the deposits having occurred without any fault or neglect on the part of the trustees, and they not having taken any steps to secure a *pro rata* division of the property, it was held that an individual depositor might sue for and recover the whole of his deposit, because this was plainly contemplated by the by-laws, and because it did not appear to be the intention that there should be any apportionment of a loss, except among those who should be depositors at the time of the final division, since there was an express engagement to pay four per cent. a year interest on deposits, whether the society realized that amount or not. Shepley, J., delivered the opinion of the court, and after showing that it was the clear intention of the by-laws that a depositor should have liberty, at any one of the times specified, to withdraw his deposit after giving one week's notice, proceeded as follows:

"Another position taken in defense is, that the institution is to be considered as the trustee, and the depositors as the *cestui que trusts*, and that the losses, therefore, fall upon them. That some or all of them must bear the losses when the institution can not pay all, is undoubtedly true. And so must those persons who have claims against any other corporation which is in a like condition. But that the institution is to be regarded as assuming merely the responsibilities which attach to a common trustee, who takes the money of the person to be benefited and invests it for him, and accounts to him by delivering to him the money, or what remains after deducting losses, or the property in which it has been invested, with its increase, can not be admitted. Such a trustee makes no engagement, and none is implied by law, beyond that of acting prudently and faithfully in preserving, investing, and restoring the property, or what may not be lost without his fault. Such a trustee could not present the motives necessary to induce a deposit in a savings institution, nor carry into effect the purpose of enabling the class of persons intended to be benefited to have their money placed where it might be preserved and increased, and yet be returned to them whenever wanted to meet unexpected and necessitous calls. To present the motives and accomplish the design held out by the institution, it was necessary that it should assume additional and more onerous and responsible duties than attach to a common trustee. Accordingly, it is found that the institution had undertaken to act in a different manner, and to assume liabilities of a peculiar character, and suited to carry into effect its special purposes. It proposed to proceed, not upon the well-known principles of a common trust, but upon a system of its own benevolent devising, by which it will receive and invest his money not alone and separate, as in common trusts, but with that of an unlimited number of others; that from all these investments it will obtain an interest, of which no exact part can be decided to belong to any one, as accruing from his money; that it will at stated times pay out to him, not even his share of the whole interest earned, but a designated portion, only reserving, it may be, a residue; that it will pay him four per cent., or at that rate, without any condition annexed, whether it has or has not earned it; that it will pay out not what may be found to belong to him upon an adjustment of profit and loss, but the sum deposited, and that it will not account with him by a delivery of the property in which his money may have been invested, but will pay it out as provided in the fifteenth by-law, which states that 'all moneys received by the treasurer shall be specie or such bills as are received on deposit at the Portland banks, and all payments shall be made by him in the same manner.' It is proposed to reserve the increase of interest, if any, over

four per cent.; and this might operate as a compensation to the continuing depositors for any injury which such a course might bring upon them. This was to be divided among those who, for five years, might have been subjected to this process of paying out to one, not precisely his own money or property, or its increase, but a certain interest and the full amount of his deposit in cash, from the common fund of the institution. To this course the institution has pledged itself by its charter, by-laws, and regulations, and all the depositors have pledged themselves by the very act of making the deposit. And all the depositors in effect agree, that one who pleases to call for his money may receive it in full and in cash; and that they will look to the remaining funds for their rights.

"In all these particulars the rights and duties of the depositors and of the institution are different from those of common trustees and *cestui que trust*. And well might it be said on a former occasion, that it assumed other and greater duties and liabilities than those properly appertaining to a trustee. And it would seem that their obvious character might have operated as an excuse for omitting to set them forth at large. And the corporation having assured, and repeated the assurance, as has been seen, that the depositors might take out their money on certain days when they pleased, without annexing any condition, or requiring any adjustment of accounts, or losses and gains, it might be said with perfect accuracy that it did, in effect, assume the whole risk of losses, for it undertook, at all events, to pay a stipulated interest and to repay the principal sum. But it is said by one of the counsel that this can not be correct, for the seventh by-law provides that 'the trustees of this institution shall receive no emolument therefrom, and while engaged to a conscientious and upright discharge of their duties, they are not to be held responsible for any losses which may happen from any cause whatever, except their willful and corrupt misconduct.' The error lies in considering the trustees as personally assuming to perform the engagements of the institution. While this argument, as presented by the other counsel, is that the by-law is applicable to the corporation itself, excusing it from the risk of losses; and that, by 'some confusion of ideas,' the trustees were named when the corporation was intended. The by-law, however, is neither of doubtful meaning nor obscure. The design was not to provide a protection for the corporation against losses which it did not seek, except in one event, to be hereafter noticed; but it was to protect the persons who might be trustees from being called upon to make up losses, as is clearly shown by the following provision in that by-law: That 'those trustees only who may be concerned in such misconduct shall be answerable for the same.'

"It was also asserted in argument that the funds of the institution were to be considered as a partnership fund. And it was proposed to apply the law applicable to partnership property to regulate the rights of all interested. But the doctrines of that law can have no proper application to this case. There is no union of interests or of rights between the plaintiff and the corporation. On the contrary, they are separate and distinct. They depend upon mutual stipulations, but the share of them undertaken by each is different. And if the several depositors can, in any other sense than as interested in the same fund, be considered as partners, they have consented, by the act of making their deposits, as before noticed, that each may, according to the regulations, withdraw his money. And they have done this without any limitation or condition that there should first be an adjustment of profit and loss. To have waited for such an adjustment in such case before payment would have been so vexatious and impracticable as to be destructive of all the benevolent purposes of the institution." The learned judge farther

showed that the trustees could not fairly object that this decision would produce inequality of distribution among the depositors, because they had an adequate remedy in their own hands, in the power confided to them by the by-laws, of dividing the property equally, in case they deemed it expedient to do so.

The relation between a depositor in a savings bank and the bank may be modified also by private agreement. Where, for instance, he has specially agreed that his deposit may be converted into stock upon which he is to receive increased dividends, he can not, on the bank's becoming insolvent, claim that his deposit shall be protected: *Maryland Savings Institution v. Schroeder*, 8 Gill & J. 93. It is further to be remarked that, although the relation between a savings bank and its depositor is not like that between other banks and their general depositors, still, such a deposit is not a bailment but a chose in action, and the bank on being sued for the deposit can not set up in defense that it is the proceeds of securities belonging to other parties, who have notified the bank of their claims: *Lund v. Seamen's Bank for Savings*, 37 Barb. 129.

POWER OF EQUITY TO SECURE EQUAL DISTRIBUTION.—It seems to be clear, from what has been said, that as the relation between an ordinary bank and a general depositor is the strictly legal one of debtor and creditor, the depositor must resort to a court of law to enforce his rights, unless some special equity has been superinduced. He is a mere general creditor, and can not come into equity and obtain any preference by procuring the appointment of a receiver or otherwise. See the principal case. And on the other hand, where he has begun his action, neither the corporation nor the other depositors can invoke the aid of equity to secure equality of distribution. Equity has no general jurisdiction over corporations, in the absence of any statutory negotiations upon the subject, except in cases of trust, injunction, or other like heads of equity jurisdiction: *Attorney-general v. Utica Insurance Co.*, 2 Johns. Ch. 371; *Attorney-general v. Bank of Niagara*, Hopk. Ch. 354; *Bangs v. McIntosh*, 23 Barb. 591; *French Bank case*, 53 Cal. 495; Kerr on Receivers, Bispham's note, 81. Independently of statutory enactments, Mr. Bispham says, in the note just referred to, equity has jurisdiction to appoint a receiver over corporate property in the following cases: 1. At the suit of those who have a lien upon the corporate property. 2. At the suit of creditors who have obtained judgment and have exhausted legal remedies to collect it. 3. At the suit of a creditor or stockholder of a moneyed corporation interested in its funds, where there is a breach of duty on the part of the directors, and a threatened loss of funds. 4. Where the corporation is dissolved and has no officer to attend to its affairs. Where, however, the depositor is entitled to a preference, and the bank is a mere trustee, equity has jurisdiction: *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg. 184.

So far as the bank itself is concerned it undoubtedly has the same power that any other debtor has, in case of insolvency, to assign its property in trust for the payment of all its creditors, or of certain preferred creditors: *Morse on Banking*, 122; *State v. Bank of Maryland*, 6 Gill & J. 206; *Dana v. Bank of United States*, 5 Watts & Serg. 223; *Stevens v. Hill*, 29 Me. 133; *Sargent v. Webster*, 13 Met. 497; *Bank Commissioners v. Bank of Brest*, Harr.Ch. (Mich.) 106; *Merrick v. Bank of Metropolis*, 8 Gill, 59. But it can not, any more than any other debtor, have a receiver appointed: *Kimball v. Goodburn*, 22 Mich. 10; *Hugh v. McRae*, Chase's Dec. 466. In the case last cited, certain creditors had obtained judgment against a bank, and were proceeding to enforce it when the bank filed a bill in equity, setting forth its insolvency,

and that the defendants were about to obtain a preference, and prayed an injunction and the appointment of a receiver. Chief Justice Chase denied the prayer of the bill, and in doing so said: "The court is not aware of any case which will warrant its assuming the administration of the estate of a debtor simply upon the ground of insolvency. If such a case could be found, the court will be called upon to administer every estate when the debtor found himself unable to administer it himself conveniently. A creditor in a proper case might come into a court of equity for the appointment of a receiver, but a debtor could not."

The case is different, however, with a savings bank whose deposits are its sole capital, in which all the depositors have an interest. The bank, in such a case, being a trustee having many *cestuis que trustent*, it would be contrary to every principle of equity to permit either the bank, or some of the depositors to deprive other depositors of their equal right in the common fund. It is a fundamental rule of equity courts that "equality is equity." The jurisdiction of courts of equity in cases of this kind is very clearly defined in the case of the *Newark Savings Institution*, 5 Reporter, 401, in the court of appeals of New Jersey. In that case, some of the depositors were withdrawing their deposits, thus requiring available assets to be converted into cash; and the bank, as trustee for the depositors, applied to the court for instructions. The chancellor, after approving the doctrine of *Coile v. Society for Savings*, 32 Conn. 173, and *Bunnell v. Collinsville Savings Society*, 38 Id. 203; S. C., 9 Am. Rep. 380, thus expressed himself: "The depositors (in the absence of fraud on the part of the managers, from which personal liability would arise) have no recourse whatever for the repayment of their principal or interest to anything except the general investments of the institution. The trust thus created is a general or public trust. No depositor has, under the charter or in equity, any right to any particular security in the hands of the institution for his deposit, more than any other depositor. All the assets, after deducting necessary expenses, are held as a common fund for the security of all the depositors. It follows that no depositor has any reason for complaint if he is not permitted to receive his deposit in full, if there be even any uncertainty as to whether there will be assets enough to pay all the depositors in full. It follows, also, that the institution ought not, under such circumstances, to be permitted to exhaust such of its securities as are immediately convertible into cash, without loss, in the payment in full of clamorous or alert depositors, and leave for those who are less vigilant, or who may be less informed of the situation, the securities which are less available, and on which such loss may be sustained, as that the latter may fail to realize the full amount due them."

It is true that in the *French Bank case*, 53 Cal. 495, which was that of a savings bank, the court denied its jurisdiction to appoint a receiver, either under the statute or at common law, upon the application of a creditor and depositor; but that was not the case of a savings bank pure and simple. Under the California law, a savings bank may have a capital stock and stockholders, whose rights and privileges shall be distinct from those of depositors, and the directors may declare dividends, etc. The depositors have, however, a priority of payment over the stockholders. The opinion of the court in this case does not ground the judgment there pronounced upon any principles or circumstances peculiar to savings banks or savings and loan corporations. The district court had appointed a receiver. Its action was not attacked or reviewed upon appeal, or by any mode known to the law for the correction of the erroneous exercise of an existing power to hear and determine the action or proceeding. The case was brought before the supreme court upon

certiorari; and that court determined that in no case had the district court, at the suit of a private person, the power to appoint a receiver of a corporation, because to do so, would necessarily result in the destruction or dissolution of the corporation. The order of the lower court was, therefore, annulled. Where this decision is regarded as correct, there seems to be no substantial or adequate remedy for depositors in savings and loan societies or corporations, particularly in those corporations having stockholders and a capital stock. The funds of the depositors are usually tenfold greater than the amount paid in by the stockholders. The deposits are not special, but general, giving rise, according to the weight of the authorities, to the relation of debtor and creditor between the corporation and its depositors. If so, there seems to be no jurisdiction having the power to seize upon the assets for the equitable distribution thereof among the depositors. The latter are, therefore, at any time likely to be ruined by the action of some of their own number, impelled forward by the influence of some financial panic and by a multitude of attachments and executions, struggling for priority where there ought to be equality, and by the unavoidable expenses of litigation and the equally unavoidable shrinkage attendant upon forced sales and unusual financial disturbance and oppression, depleting the fund out of which all should be paid, and thus rendering its inadequacy more certain and more appalling than before.

PHOENIX FIRE INSURANCE CO. v. GURNEE.

[1 PAIGE CH. 278.]

CORRECTION OF MISTAKES IN POLICIES OF INSURANCE, as well as in other written instruments, is within the jurisdiction of equity.

EVIDENCE OF THE MISTAKE must be clear and satisfactory.

MISTAKE IN DESCRIPTION OF PROPERTY INSURED.—Where the memorandum drawn up by the clerk of the insurers, called for insurance on a “grist-mill,” and the policy when issued was on a “mill-house,” the mistake was corrected on a bill filed by the insured, after a loss, although he read over the policy before he left the office.

APPEAL from the equity court of the first circuit. The complainant filed his bill for the correction of a mistake in a policy of insurance issued to him by the defendants. It appeared that on the application of the complainant for an insurance on his grist-mill, the defendants’ clerk drew up a memorandum, which was signed by the complainant, in which the property was described as a “two story and a half frame grist-mill, situate in the town of Haverstraw, on Minisicongo creek, in Rockland county, one run of stone, two bolts, one spare runner, with privilege to use a stove in second story.” The policy, when issued, described the property as a “frame mill-house, two and a half stories high, situate in the town of Haverstraw, on Minisicongo creek, Rockland county, privileged as a grist-mill only.” The mill was burned; and the defendants having in-

sisted that the insurance was only on the mill-house, and not on the mill or machinery, the complainant applied to them to correct the policy to conform to the memorandum, which was refused. This bill was then filed. Decree, that the policy be corrected in accordance with the memorandum, from which the defendants appealed.

J. L. Graham, for the appellants.

J. Anthon, for the respondent.

The CHANCELLOR. It is well settled, that a court of equity has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments: Phil. on Ins. 14. But the evidence of such mistake, and that both parties understood the contract in the manner in which it is sought to be reformed, should be clear and satisfactory. In policies of insurance, the label or written memorandum from which the policy was filled up, is always considered of great importance in determining the nature of the risk and the intention of the parties. Thus, in *Molteaux v. The London Insurance Company*, 1 Atk. 547, Lord Hardwicke held that a policy ought to be rectified agreeably to the label; and in the issues which he directed in that case, the label was treated as the real contract between the parties. In this case there is a substantial difference between the policy and the written memorandum on which it was founded. The one is an insurance upon a grist-mill, and the other is only upon the mill-house, or the mere covering of the substantial parts of the mill. It is to be presumed that insurers are acquainted with the nature of the property which they undertake to insure. If so, the defendants must have known that no owner of a grist-mill would ever think of insuring the mill-house only, leaving all the substantial parts of the mill exposed to certain destruction, if the mill-house or covering was destroyed.

The difference of the description from the written memorandum, must, therefore, have been clearly a mistake of the clerk in filling up the policy, or an intentional fraud upon the insured; and the latter is certainly not to be presumed. Although the complainant read over the policy before he left the office, it is hardly to be presumed that a plain countryman, unacquainted with the law of insurance, would have noticed or understood the difference which was produced, by the change of phraseology in the policy, from the plain and intelligible language of the memorandum, which was probably taken down from the lips of the insured.

I think the decree of the circuit court was correct; and the same must be affirmed, with costs.

MISDESCRIPTION IN POLICY OF INSURANCE, EFFECT OF.—See a discussion of this subject in *Fowler v. Aetna Fire Ins. Co.*, 16 Am. Dec. 462. In *Dow v. Whetten*, 8 Wend. 167, it is held, referring to the principal case as authority, that although a memorandum of insurance can be used to reform the policy in equity, it can not be admitted in evidence at law to vary or contradict it. In *Bidwell v. Astor Mutual Ins. Co.*, 16 N. Y., it is held, citing *Phœnix Ins. Co. v. Gurnee*, that no lapse of time is a bar to relief by reforming a policy.

CONNOLLY v. PARDON.

[1 PAGE OK. 291.]

MISTAKE IN WILL.—PAROL EVIDENCE is admissible to show who was intended by a bequest made to one by a wrong Christian name.

BILL for a distributive share of the estate of the late Bishop Connolly, under his will. After sundry other bequests, the testator bequeathed the residue of his money to his "brother Cormac Connolly" and to his two sisters, Mary and Ann, in equal shares. A codicil executed the next day after the will, gave the sum of five hundred dollars "to my nephew Cormac Connolly, the son of my brother Cormac Connolly, * * * for his ecclesiastical education." James Connolly, the complainant, was the only brother whom the testator had living, unless his brother Henry, who left the family residence in Ireland unmarried, thirty years before, and had never been heard of since, was still living. The testator never had a brother Cormac. He had, however, a nephew named Cormac, the son of the complainant, who was preparing himself for an ecclesiastical education in Ireland, and was the only nephew of that name. Other facts are stated in the opinion.

C. O'Conner, for the complainant.

H. A. Fay, for the executors.

THE CHANCELLOR. From the testimony in this cause, there can be no doubt of the mistake in the will, and that the complainant was intended as the residuary legatee, who is described by the testator in the will as his brother Cormac. He could not have intended it for his brother Henry, because it is in evidence that the testator said he had made inquiries for him in this country, but could hear nothing of him, and supposed him to be dead. The reference to this devise in the codicil, and the description of his nephew as the son of his brother Cormac, show conclusively that the complainant was the legatee intended.

The cases are very contradictory on the subject of admitting parol evidence to correct mistakes in testamentary dispositions, but this steers clear of the decisions in those cases where the admission of parol evidence has been most restricted. If a legacy was given by a testator to his brother John, and it turned out in evidence that he had but one brother, whose name was James, there could be no doubt that the latter would be entitled, because the description of brother in that case would alone be sufficient, and the name might be rejected as surplusage. In this case, the legal presumption is that Henry was dead, and that James was the only brother, and that the testator, in fact, believed so at the time he made his will. Again, the codicil shows that the father of his nephew, Cormac, was the brother whom the testator intended as the object of his bounty. In *Thomas v. Stevens*, 4 Johns. Ch. 607, the late Chancellor Kent went much farther, and permitted a person not named or described at all in the will, to take a legacy, upon evidence that she was the person intended, there being no person of the name mentioned in the will.

The complainant is entitled to one third of the residuum of the estate of the testator; but the executors were justified in submitting this question to the court, and must, therefore, be allowed to retain their costs out of the same.

HAGGARTY v. PITTMAN.

[1 PATER CH., 298.]

ASSIGNMENT BY DEBTOR TO INSOLVENT ASSIGNEE.—Where a failing debtor makes an assignment to an insolvent assignee in trust for creditors, the court will appoint a receiver to take charge of the property on the application of the creditors.

ASSIGNMENT TO SURETY FOR HIS INDEMNITY.—Where an assignment is made to a surety for his indemnity, the creditor has an equitable claim upon the fund for the payment of his debt, and the assignee can not divert it to any other purpose.

BILL by creditors of Strong and Bovee, defendants, praying an account and satisfaction of their debts out of sundry demands assigned by the said Strong and Bovee to Pittman, and for an injunction and receiver on the ground of Pittman's insolvency. It appeared that Strong and Bovee were indebted to Pittman for certain money lent, and to the complainants on sundry notes on which Pittman was indorser, and that the said Strong and Bovee, having failed, had assigned to Pittman, to pay the money due him, and to secure him from liability on his

indorsements, sundry demands against other persons. Pittman filed an affidavit denying any intention to misapply the funds, and alleging that he had not collected enough to pay the amount due him.

M. C. Patterson, for the complainants, cited *Bank of Augusta v. Throop*, 18 Johns. 505; *Monell v. Smith*, 5 Cow. 441; *Maule v. Harrison*, 1 Eq. Cas. Abr. 93.

S. A. Foot, *contra*, cited *Orphan Asylum Society v. McCarty*, 1 Hopk. 429.

The CHANCELLOR. The allegation in the bill, that Pittman is insolvent, is not denied in his affidavit. This court will never for a moment sanction the idea that debtors in failing circumstances shall be permitted to put their creditors in the power of an insolvent assignee, by a voluntary assignment of their property to him, although it is expressed to be for the payment of their debts, or for his indemnity against prior responsibilities. They may lawfully prefer one creditor to another, and indemnify their sureties in preference to either; but they have no equitable right to jeopardize the honest claims of any by assigning their property to trustees who are irresponsible. And the proper course for this court in such cases is to appoint a receiver on the application of the parties for whose benefit the fund is assigned. Where the assignment is to a surety for his indemnity, the creditor has an equitable claim upon the fund for the payment of his debt; and the surety has no right to divert it to any other object: *Bank of Auburn v. Throop*, 18 Johns. 505; *Maule v. Harrison*, 1 Eq. Ca. Abr. 93;¹ 11 Ves. Jun. 22; 5 Bac. Abr., tit. Obligation, D, 4.

In this case, the assignee is personally responsible for the payment of the complainant's debts, and can not, therefore, claim to retain the demands assigned until they pay his private debt due from the assignor. A receiver must be appointed with the usual powers, and a reference to a master is directed to appoint a suitable person and to decide as to the amount and competency of sureties to be given. But the defendant, Pittman, is not required to pay over the money actually collected by him under the assignment, except so far as it exceeds the amount of his own debt.

Cited to the effect that indemnity or collateral security to a surety inures to the benefit of the payee: *Clark v. Ely*, 2 Sandf. Ch. 168; *Pratt v. Adams*, 7 Paige, 627; *Wright v. Austin*, 56 Barb. 18.

1. *Maule v. Harrison*, 1 Eq. Cas. Abr. 93.

BECK v. BURDETT.

[1 PAIGE CH. 305.]

EQUITABLE RELIEF AGAINST OBSTRUCTION TO EXECUTION.—A creditor having obtained a specific lien on property subject to execution, by issuing his execution, may file a bill here to remove a fraudulent obstruction to the sale.

PROPERTY NOT SUBJECT TO EXECUTION AT LAW CAN BE REACHED in equity only by the creditor's showing that his legal remedies are exhausted by an actual return of his execution unsatisfied.

BILL FILED BEFORE THE ACTUAL RETURN of the execution, in such a case, is premature.

SPECIFIC LIEN ON PROPERTY NOT LIABLE TO EXECUTION is not obtained by the issuing or return of an execution, but only by filing a bill in equity after the execution is returned unsatisfied.

EXCESSIVE ASSIGNMENT FOR BENEFIT OF PART OF CREDITORS.—Where an unreasonable amount of property is assigned by a failing debtor for the benefit of part of his creditors, fraud may be inferred.

MERE HYPOTHETICAL RESERVATION OF THE SURPLUS to the assignor, in such a case, where it is not probable that there will be an excess, will not vitiate the assignment.

PROVISION FOR AN INSOLVENT'S FAMILY, IN A GENERAL ASSIGNMENT of his property, renders it void as to creditors not assenting thereto.

BILL by a creditor to set aside as fraudulent an assignment made by his debtor. The facts were: The complainant had obtained judgment against B. C. Burdett, one of the defendants, on a *bona fide* debt upon which a *fieri facias* was issued. The bill was filed after the return day, but before the return of the writ, which was afterwards returned unsatisfied. The defendant failed before the commencement of the plaintiff's action at law, and assigned his property to J. Burdett, his co-defendant in the present suit, in trust, to collect and dispose of the same, and apply the proceeds to the payment of certain creditors named, and pay the residue, if any, to the assignor. The assignee had goods, still unsold, to the value of six hundred dollars when the bill was filed. The complainant asked that the assignment be set aside, the remaining goods applied to the payment of his judgment, and that J. Burdett be decreed to pay the balance of the judgment out of the proceeds of other property obtained under the assignment. Other facts are stated in the opinion.

C. Baldwin, for the complainant, contended: 1. That the assignment was void because it did not provide for all the creditors, and reserved the surplus to the assignor, and this reservation being void, it was void *in toto*: *Mackie v. Cairns*, 5 Cow.

547 [15 Am. Dec. 477]; 2 Kent Com. 421; and that the property assigned in this case exceeded the debts it was meant to secure, and the reservation in the assignment showed that this was the understanding of the parties: *Hyslop v. Clarke*, 14 Johns. 458; *Austin v. Bell*, 20 Id. 442 [11 Am. Dec. 297], *per* Spencer, C. J.; 2. That a creditor is not bound to levy on property fraudulently assigned before applying for equitable relief: *Hadden v. Spader*, 20 Johns. 554, 572, 573, *per* Platt, J.; *Donovan v. Finn*, Hopk. 77 [14 Am. Dec. 531]; 3. That it was not necessary that the execution should have been actually returned before filing the bill, but it was enough that the return day had passed, and that there was no property which the writ could reach: Mitf. Pl. 102 (3d Lond. ed.); 3 Atk. 300; Coop. Eq. Pl. 149 (1st ed.); *Brinckerhoff v. Brown*, 4 Johns. Ch. 671; *Williams v. Brown*, Id. 682, *contra*, the dictum in *Balch v. Wastall*, 1 P. Wms. 445.

J. L. Mason, for the defendants, claimed: 1. That there was no fraud in fact in this case, and there being no absolute reservation in favor of the assignor, there was no fraud in law, and that the reservation here was mere surplusage, since, if there was a surplus, a resulting trust would arise in the debtor's favor anyhow: *Wilkes v. Ferris*, 5 Johns. 335 [4 Am. Dec. 364]; *Wilder v. Winne*, 6 Cow. 284; *Hendricks v. Robinson*, 2 Johns. Ch. 283; and that only a manifestly excessive assignment for a particular creditor would be void, even though there should happen to be a surplus: *Stevens v. Bell*, 6 Mass. 339; 2. That it did not appear and would not be presumed that the assignment here embraced all the debtor's property: *Wilkes v. Ferris*, 5 Johns. 335 [4 Am. Dec. 364]; 3. That the bill was prematurely filed, as the creditor was bound to show his legal remedy exhausted by the return of the execution unsatisfied: *Brinckerhoff v. Brown*, 4 Johns. Ch. 671; *Williams v. Brown*, Id. 681; *McDermutt v. Strong*, Id. 691; *Hadden v. Spader*, 20 Johns. 554; *Angel v. Draper*, 1 Vern. 399.

THE CHANCELLOR. The defendants deny all actual fraud in relation to the assignment, and there is no evidence from which it can be inferred; therefore, the only questions of any importance in this case are as to the right of the complainant to commence proceedings here before the execution was returned by the sheriff, and whether the assignment is void in consequence of the reservation of the surplus to the assignor, without making any provision for the payment of the complainant's debt. There are two classes of cases where a plaintiff is permitted to come

into this court for relief after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case, the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of the property of the defendant, which can not be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment. In the first case, the plaintiff may come into this court for relief immediately after he has obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same is situated, and the obstruction being removed, he may proceed to enforce the execution by a sale of the property, although an actual levy is probably necessary to enable him to hold the property against other execution-creditors or *bona fide* purchasers. *Angel v. Draper*, 1 Vern. 399, and *Shirley v. Watts*, 3 Atk. 200, are cases of this description. In the first, a fraudulent assignment was interposed to prevent a sale of the defendant's property on execution, and in the last case it became necessary to redeem a term for years in a leasehold property from the lien of a prior mortgage. In both these cases the plaintiffs were allowed to come into equity for relief before the executions were returned unsatisfied. *McDermutt v. Strong*, 4 Johns. Ch. 687, belongs to the other class of cases, for although an attempt was made to levy the execution upon the defendant's interest in the vessel assigned, it is clear he had no interest which was a proper subject of seizure and sale on the execution. The issuing of an execution, or even a formal levy, can create no lien upon a chose in action, or a mere equitable interest in personal property, which is not liable to be sold on execution. In such cases, the actual return of the execution unsatisfied is necessary to give this court jurisdiction to decree satisfaction out of the equitable property of the defendant. Such is the construction recently adopted by the legislature in such cases: R. S., part 3, c. 1, tit. 2, sec. 38; and a similar principle is adopted in that part of the revised statutes which enables creditors to reach the equitable interest of persons holding lands under contracts for the purchase thereof: *Id.* part 2, c. 1, tit. 4, sec. 4. In all these cases, where the property is not liable to an execution at law, the plaintiff obtains no lien upon the

property or fund by the issuing or return of the execution. But it is the filing of the bill in equity, after the return of the execution at law, which gives to the plaintiff a specific lien: *Per* Lord Hardwicke in *Edgell v. Haywood*, 3 Atk. 357. The bill in this case contains the proper allegation that the execution had been returned unsatisfied. The fact is denied by the answer, and the evidence in the case supports that denial. The bill, therefore, was prematurely filed, and no relief can be granted thereon except as to the goods which remained unsold at the time of the execution issued. If the assignment was fraudulent, they are liable to be seized and sold on the execution. J. Burdett has since sold the goods, and if he improperly covered them from a levy and sale by the sheriff, he must account to the plaintiff for their value. It therefore becomes necessary for the court to examine the other question in this cause.

If a debtor in failing circumstances makes an assignment of his property for the benefit of part of his creditors only, and the value of the property assigned is more than the parties could have reasonably supposed necessary to satisfy the claims of those creditors, fraud may be inferred from that circumstance alone, unless a satisfactory excuse is shown for the transfer of the excess. But in this case it was, at the time of the assignment, and still is, doubtful whether the property assigned was sufficient to satisfy the claims of the creditors for whose benefit the assignment was made. Their debts were rising of twenty-six thousand dollars, and the whole nominal amount of property and demands assigned, including twenty-one thousand dollars of outstanding claims, is short of thirty-four thousand dollars. It was, therefore, not probable there would be any excess, after making due allowance for bad debts, and deducting the expenses of collection, and of executing the trust.

Does, then, a mere hypothetical reservation of the surplus, if any there should be, to the assignor, vitiate the assignment? It certainly does not alter the legal liability of the assignee, because, without that provision, he would in equity be compelled to account for the surplus. In *Wilkes & Fontaine v. Ferris*, 5 Johns. 335 [4 Am. Dec. 364], it was settled that an implied reservation of the residue to the assignor did not render the assignment void; and in *Stevens and others v. Bell*, 6 Mass. 339, and in *Passmore v. Eldridge*, 12 Serg. & R. 198, although express reservations of the surplus were made to the assignors, the assignments were sustained. The case of *Mackie v. Cairns*, 5 Cow. 547 [15 Am. Dec. 477], establishes the principle that

an insolvent can not legally make a provision for himself or family, even for a limited period, out of the property which belongs to his creditors; and that such a provision, contained in a general assignment of his property, rendered the assignment void as against creditors who had not assented thereto. But on a careful review of the cases on this subject, I am satisfied that the assignment complained of in this case was a valid instrument, and that it does not come within the principle of the decision in *Mackie v. Cairns* [15 Am. Dec. 477].

The bill in this cause being prematurely filed, the complainant is not in this suit entitled to an account and satisfaction of his debt, out of the surplus of the assigned property, if any there should be. His bill must, therefore, be dismissed with costs.

REFERRED TO AS AUTHORITY, that a creditor as to whom a deed is void may, as soon as he has obtained a judgment which is a lien upon the land, file a bill to set the deed aside: *Mohawk Bank v. Atwater*, 2 Paige, 58; *Clarkson v. De Peyster*, 3 Id. 322; *Loomis v. Tift*, 16 Barb. 547; that return of the execution unsatisfied is necessary to give the court jurisdiction to decree satisfaction out of equitable assets: *McElwain v. Willis*, 3 Paige, 507; S. C., 9 Wend. 566; *Dunlevy v. Tallmadge*, 29 How. Pr. 400; S. C., 32 N. Y. 459; *Owen v. Dupignac*, 9 Abb. Pr. 185; that a complainant's right in equity depends on his having exhausted his legal remedy: *Child v. Brace*, 4 Paige, 310; that an equitable lien is not acquired in such a case until the bill has been filed: *Lawrence v. Bayard*, 7 Paige, 76; *Boynton v. Rawson*, 1 Clarke's Ch. 591; *Watson v. Le Row*, 6 Barb. 486; *Myrick v. Selden*, 36 Id. 22; that as respects personal property the complainant can get no lien until execution has been issued: *Spear v. Wardell*, 2 Barb. Ch. 301; *Brainard v. Cooper*, 10 N. Y. 360; *Shaw v. Dwight*, 27 Id. 249, *per Denio*, C. J., 250; *per Marvin*, J., dissenting. In *Storm v. Waddell*, 2 Sandf. Ch. 512, the principal case was referred to as holding a different doctrine from *Donovan v. Fiss*, 14 Am. Dec. 531.

SUFFERN v. JOHNSON.

[1 PAIGE CH. 450.]

MORTGAGE SALES WILL BE CONTROLLED by the court so that no injustice will be done to either party, and a part or the whole of the property sold as may best conduce to that end.

WHERE ONLY PART OF THE DEBT IS DUE, a sale of the whole property is not a matter of course, but if the person in possession is not responsible for the debt, and the security is insufficient, the sale of the whole, or so much as may be necessary to pay the entire debt and costs, will be ordered, unless the defendant pays the installment due or gives security for the payment of the residue.

MORTGAGED PROPERTY SHOULD BE SOLD TOGETHER or in parcels, whichever will produce the highest sum.

BILL of foreclosure. After a decree referring it to a master to compute the amount due on the mortgage, and for a sale of the premises, and after the confirmation of the master's report, the defendant, Johnson, having heretofore appeared and had notice of the proceedings, presented a petition stating that only part of the debt was due; that he had purchased part of the premises; and that they were so situated that they could be sold in parcels. He accordingly prayed that only enough should be sold to pay the amount now due. The complainant filed an affidavit showing that the security was inadequate; that the defendants had committed waste, and that the property would bring most if sold together.

W. A. Seeley, for the complainant.

S. M. Fitch, for the defendant Johnson.

The CHANCELLOR. In cases of mortgage sales, this court will control and regulate the proceedings so that no injustice shall be done to either party. And the court may order the whole or a part of the mortgaged premises to be sold as shall be most conducive to that end. It is not a matter of course to order the whole property to be sold where only part of the mortgage money is due; but it may frequently be necessary, to prevent injustice. If the person in possession is not responsible for the debt, and the premises are not a sufficient security, the sale of two thirds of the property might be necessary to pay a moiety of the debt which has fallen due; and the defendant would retain possession of the residue of the property, and put the rents and profits in his own pocket until the other installments fell due, leaving the complainant remediless as to a great part of the remainder of his debt. In such cases, the whole of the premises, or so much as is necessary to pay the whole debt and costs, should be sold, unless the defendants choose to pay the amount of the installment which is due, before the sale, or will give security that the residue of the mortgage money shall be paid when it falls due. In *Campbell v. Macomb*, 4 Johns. Ch. 534, all the money which had become due was paid before the application to this court to stay the proceedings.

The defendant, Johnson, may have an order directing the master not to proceed and sell if the amount now due and the costs are paid before the day of sale, or to sell only so much of the property as will satisfy that amount, provided the defendants, or either of them, give to the complainant sufficient security, to be approved of by the master, that the sums yet to fall

due shall be paid. But as the proceedings on the part of the complainant have been perfectly regular, the defendant, Johnson, must pay the costs of resisting his application. It is the duty of the master in all cases, unless otherwise specially directed, to sell the premises either together or in parcels, as he shall think best calculated to produce competition, and enhance the value on the sale.

That the court may decree a sale of the whole premises where it will be most beneficial, see *Gregory v. Campbell*, 16 How. Pr. 422, citing the foregoing decision. As to sales *en masse* on execution, see *Wilson v. Twitty*, 14 Am. Dec. 569, and note.

SWEET v. GREEN.

[1 PAIGE CH. 473.]

COVENANT INSERTED BY FRAUD OR MISTAKE.—A covenant of warranty against all persons claiming under the grantor, inserted in a quitclaim deed by fraud or mistake, inures to the benefit of a *bona fide* purchaser from the grantee, without notice, and vests in him the original grantor's after-acquired legal title, which will not be divested by subsequent notice to the purchaser or his assigns, and such covenant will not be stricken out on a bill filed by the covenantor.

PURCHASER UNDER A JUDGMENT acquires all the right of the judgment-debtor in the premises, and no equity can be set up against him on account of notice which did not exist against the debtor.

BILL to amend a conveyance by striking out a covenant of warranty contained therein, on the ground that it was inserted by fraud or mistake. The facts were: The complainant, having received a conveyance of certain land from one Jonathan Green by way of mortgage, subsequently agreed to take part of the land at an appraised valuation, and to pay the excess over his mortgage, if any, as well as to convey the rest of the land to one John Green, it being understood that he had not the legal title, but that he was to give as good a title as he got from Jonathan Green. He executed a quitclaim deed of the said premises to Joseph Green accordingly, but there was inserted therein a covenant of warranty against all persons claiming by or under the grantor. This was the covenant which the bill asked should be stricken out as having been inserted by fraud or mistake. The land embraced in said quitclaim deed, after sundry mesne conveyances, was conveyed to David and Green Crandall with warranty in 1813. In 1815, Green, the defendant in this suit, recovered a judgment against the Crandalls, under which

he obtained a conveyance of the premises from the sheriff. The complainant, however, obtained possession under a junior judgment against the Crandalls. The legal title to the land was in Stephen Van Rensselaer until 1816, when it was conveyed to the complainant, who, when the mortgage was originally made to him by Jonathan Green, was authorized, in case of non-payment, to receive the deed from Van Rensselaer in his own name. The complainant now claimed title, but supposing himself estopped by the covenant above mentioned, filed this bill to get rid of the same.

A. Van Vechten and J. P. Cushman, for the complainant, insisted that the covenant was inserted by fraud or mistake, and ought not to prevail against the complainant's recently-acquired legal title, and no lapse of time was a bar to relief for fraud: *Cooke v. Clayworth*, 18 Ves. 16; *Nichol v. Trustees of Huntingdon*, 1 Johns. Ch. 166, 177.

D. Buel, jun., and D. Gardner, for the defendant, contended: 1. That a mistake could not be corrected so as to defeat the intention of the parties: *Lyman v. United Ins. Co.*, 17 Johns. 377; *Maine v. Administrator of Dickinson*, 2 Desau. 191; 2. That the defendant purchased *bona fide* without notice that relief was barred by lapse of time, and that ignorance of the effect of a covenant which had been read could not be set up: *Anderson v. Roberts*, 18 Johns. 531; *Fletcher v. Peck*, 6 Cranch, 133; *Sugden*, 661; 1 *Mad. Ch.* 206; *Jackson v. Henry*, 10 Johns. 185 [6 *Am. Dec.* 238]; *Stark. Ev.*, pt. 4, 1018-1020; *Jones v. Statham*, 3 *Atk.* 389; *Executors of Getman v. Beardsley*, 2 Johns. Ch. 274; *King v. Baldwin*, *Id.* 557; *Lyman v. United Ins. Co.*, *Id.* 630; *Irnham v. Child*, 1 *Bro. C. C.* 93; *Shelburne v. Inchequin*, *Id.* 341; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 354; *Storrs v. Barker*, 6 *Id.* 166 [10 *Am. Dec.* 316]; 1 *Amb.* 101; *Gregory v. Gregory*, *Coop. Ch.* 201; *Bonny v. Ridgard*, 1 *Cox Ch.* 145; *Morse v. Royall*, 12 Ves. 373, 377; *Davone v. Fanning*, 2 Johns. Ch. 252; *Underhill v. Van Cortlandt*, *Id.* 362.

THE CHANCELLOR. There are several substantial objections to the complainant's claim to amend the original conveyance by striking out the covenant. At the time he obtained his conveyance of the legal title from S. Van Rensselaer, Crandall was in possession as a *bona fide* purchaser of the premises by divers meane conveyances from the complainant's grantee, and without any notice of the alleged fraud or mistake. The moment, therefore, that Van Rensselaer's deed was given by the covenant of

warranty in the conveyance of Sweet, Crandall became vested with a perfect title in the half acre, and subsequent notice to him or his assigns could not divest that title; Green, who obtained the property under the judgment against Crandall, obtained all the right which the latter had in the premises, and no equity can be set up against him on account of notice: *Jackson v. McChesney*, 7 Cow. 360 [7 Am. Dec. 521]. Independent of this legal objection, I am satisfied from the testimony that the effect of the covenant, under the circumstances, produces the exact state of things contemplated by the parties; and if it had not been inserted, the defendant would have been entitled in equity to a quitclaim from the complainant of the title acquired under the conveyance from Van Rensselaer. And the weight of proof also is, that the covenant was knowingly and intentionally inserted for the purpose of vesting the title in the grantee whenever a conveyance for the whole lot should be obtained from Van Rensselaer, the nominal owner.

The bill must be dismissed, with costs.

Covenants running with the land are a part of the title, and pass to a purchaser at sheriff's sale: *Sheridan v. House*, 4 Keyes, 592, per Grover, J., dissenting and citing the principal case.

DURELL v. HALEY.

[1 PAIGE CH. 492.]

CONCEALMENT OF HIS INSOLVENCY BY A PURCHASER of goods, who obtains possession without intending to pay for them, is a fraud, and the property does not pass.

BONA FIDE PURCHASER FROM THE FRAUDULENT VENDEE in such a case, having paid for the goods without notice of the fraud, will be protected.

PURCHASER HAVING SUFFICIENT NOTICE TO PUT HIM IN INQUIRY is not a *bona fide* purchaser.

PURCHASE OF GOODS BY AN INSOLVENT, with a view to subjecting them to an execution which has been issued immediately after a confession of judgment to a friend, is a fraud, and the execution creditor will not be permitted to hold the goods.

BILL by the vendors of certain goods to set aside the sale as fraudulent, and to obtain a restoration of the goods. The facts were: The defendant, Haley, on August 7, 1826, being insolvent, gave a judgment-bond to the defendant Turner, to secure a real or pretended debt of three thousand dollars. Judgment was immediately entered and execution issued, and Turner took pos-

session of Haley's store. Haley, on the eighth and ninth of August, purchased the goods now in controversy from the complainants, and took them to the store, where they were levied on under Turner's judgment, and at the sale Turner became the purchaser.

D. Selden, for the complainants, claimed that where a purchaser buys goods with a view to subjecting them to an execution, or conceals the fact that he is insolvent, it is a fraud: *Van Cleaf v. Fleet*, 15 Johns. 147; *Cross v. Peters*, 1 Greenl. 376 [10 Am. Dec. 78]; 2 Kent. Com. 404.

S. B. H. Judah, *contra*.

The CHANCELLOR. This is a clear and palpable case of fraud. It is not very material to inquire whether the judgment bond was given for a real debt or one which was entirely fictitious. If the cause turned on that question, I should be inclined to believe the whole transaction was fraudulent from the beginning. But the purchase of the goods was a gross fraud, so that the title to them was not changed. Haley knew he was insolvent and unable to pay for these goods, and unquestionably purchased them with a view to subject them to the execution which had been previously issued; and to induce the complainants to sell, he paid up a small sum due upon his antecedent purchases. If a purchaser who is insolvent conceals that fact from the vendor, and thus obtains goods without intending to pay for them, it is a fraud, and the property is not changed in the hands of the vendee; but the goods would be protected in the hands of a *bona fide* purchaser from the fraudulent vendee, if he had purchased and paid for the same without notice of the fraud. In *Sinclair v. Steavenson*, 10 Moore, 53, Best, chief justice, says, if a person orders goods to be sent to him at night, and early the next morning commits an act of bankruptcy, he must be taken to have obtained possession of them by artifice or fraud. The case of *Van Cleaf v. Fleet*, 15 Johns. 147, is directly in point to show that the property was not liable to the execution of Turner. I have no doubt he was well acquainted with the fraud; but certainly he can not be considered a *bona fide* purchaser, as he had enough, at least, to put him on inquiry.

There must be a decree that the goods be restored to the complainants, and that the defendants pay the costs of this suit. I shall also direct that the copies of the pleadings and proofs be delivered to the district attorney of New York, that he may

lay the case before the proper tribunal to inquire whether the defendant Haley is not liable to be punished for obtaining these goods by false pretenses.

CONCEALMENT OF INSOLVENCY AS FRAUD.—Where a purchaser of goods, in order to obtain credit, conceals his insolvency, not intending to pay for the goods, it is a fraud: *Buckley v. Archer*, 21 Barb. 589; *Rawdon v. Blatchford*, 1 Sandf. Ch. 347; *Johnson v. Monell*, 2 Keyes, 663; *Nichols v. Primer*, 18 N. Y. 306; *Chaffee v. Fort*, 2 Lans. 87; all citing the foregoing case. But a bona fide purchaser from the fraudulent vendee will be protected: *Hoyt v. Sheldon*, 3 Bos. 296.

SQUIRE v. HARDER.

[1 PAIGE CH. 494.]

RESULTING TRUST TO A GRANTOR, CONTRARY TO THE EXPRESS TERMS of his conveyance, can not be raised.

CONVEYANCE IN FEE, WITH WARRANTY, ESTOPS THE GRANTOR from alleging an interest in the purchase money which will raise a resulting trust to him.

PART PERFORMANCE OF A PAROL AGREEMENT respecting land, to warrant a specific enforcement of the contract, must be in consequence of the contract.

SPECIFIC PERFORMANCE OF A PAROL AGREEMENT will be decreed against defendants who set it up and join in a prayer for its specific execution.

HUSBAND CAN NOT MAKE AN AGREEMENT AFFECTING THE WIFE'S RIGHTS without her consent, and such an agreement, she not being a party, will not be enforced in equity.

BILL for the partition of certain mill property. The bill alleged that one Harder died seised of the property in question and of the undivided half of a certain farm; that the complainant, Rebecca Squire, with whom her husband was joined in this suit, was one of the said Harder's children, and that his widow and the other children were the defendants; that at a sale of one half the mill property by the administratrix, under an order from the surrogate, the complainant, Olivia Squire, became the purchaser, but afterwards resold the same to the widow, and that, prior to such resale, the undivided half of the farm was also sold by the widow and heirs, she receiving one third of the purchase money, which she agreed to lay out in land for her use for life, remainder to the heirs. The defendants admitted the allegations of the bill except as to the widow's agreement to lay out her third of the purchase money of the land as above stated. They alleged, on the contrary, that the understanding

was that she was to keep said sum for her own use, and that about four hundred dollars of the money expended in the purchase of the mill property was raised in another way. They also averred that Harder died seised of certain wild land, in which the widow was entitled to dower, but which it was agreed by all the parties that she should release to the heirs, in consideration of which she was to have the use of their half of the mill for life; that they had, accordingly, made partition of the wild land, and she had taken possession of the mill. The defendants, therefore, prayed a specific performance of the agreement.

A. L. Jordan, for the complainants.

C. Bushnell, for the defendants.

WALWORTH, Chancellor. The allegation in the bill that Mrs. Harder agreed to lay out the money received for the farm in other real estate, for the benefit of the heirs after her death, is absolutely denied in the answer, and is not supported by proof. There can, therefore, be no doubt that the widow is absolutely entitled to one half of the mill property in fee. The other ground assumed by the complainants' counsel, that she purchased it with the moneys received for the farm, in which she had only a life interest, and that there was a resulting trust in their favor on the purchase, is wholly untenable. No resulting trust can be raised in opposition to the express terms of the conveyance, and in favor of the grantor. In this case, the complainants have given an absolute conveyance of the inheritance, with warranty. They are, therefore, estopped from alleging that a part of the consideration was received in their own money, and that she only took a life-estate as to the one sixth. If they did not voluntarily relinquish their claim on that money, their claim was personal on her; but they have no legal or equitable interest in the premises conveyed.

From the testimony taken in the cause, I am induced to believe there was a verbal understanding that she should have the use of the other half of the mill property, for life, as an equivalent for her dower in the wild lands. Whether that dower right was or was not of nearly the same value, cannot be material in the view I have taken of this question. There was no valid agreement which can now be enforced against the complainants, inasmuch as they set up the statute of frauds. There has been no part performance of that agreement to take the case out of the statute. The partition of the wild land among the

heirs did not affect her interest in the least. They had the right, and probably would have done the same thing, if no agreement as to the dower had been made. Neither does it appear from this testimony that she took possession, or has made any permanent repairs on the mill property under that agreement. She was already in possession as the absolute owner of one half, and as tenant in dower of one third of the residue. I do not understand that any change took place at the time of that agreement. Besides, there is another insuperable objection to a specific performance of that agreement, even if it had been reduced to writing. The right in the mill property belonged to the wife, and the husband could not make any agreement which would destroy her right, without her consent. The other heirs having, in their answer, set up this parol agreement, and joined in a prayer for a specific performance thereof, it must be so decreed as against them.

There must, therefore, be a decree for a partition of the premises among the parties accordingly; but, as the parol agreement has probably prevented the widow from asserting her right to dower in the wild land which fell to the share of the complainants, the partition must be without any account against her for the rents and profits of the mill property which belonged to Squires, in the mean time; and the rights of the respective parties are declared as follows: The complainants, in right of the wife, are entitled to one twelfth part of the premises, subject to the life-estate of the widow in one third of that twelfth; each of the other heirs is entitled to one twelfth, subject to the life-estate of the widow in the whole of that twelfth, and the widow is entitled to six twelfths in fee, and to a life-estate in five twelfths, and one third of one twelfth of the residue.

As it is very certain from the testimony that the premises can not be divided, the decree must direct a reference to a master in the county of Columbia, to ascertain and report whether the premises are so circumstanced that partition thereof as aforesaid can not be made without great injury to the owners thereof; and that on the coming in and confirmation of that report, if it shall appear that partition can not be made, the premises be sold by a master, on the usual notice, and that he give a deed thereof to the purchaser, and pay to the solicitors of the respective parties their taxable costs; that he pay one half of the residue of the purchase money to the widow, and two thirds of one twelfth to the complainants; and if the parties can not agree to a division of any share or shares of the residue, in which the widow is en-

titled to a life interest, that he bring the same into court and deposit it with the register, to be invested in such manner that the widow may receive the income thereof for life, and that after her death it be paid to the parties entitled thereto, according to their rights as above declared.

MORGAN v. SCHERMERHORN.

[1 PAGE CH. 544.]

EQUITABLE RELIEF FROM USURIOUS CONTRACT.—A party seeking equitable relief from an usurious contract will not be entitled to an injunction against proceedings at law, or to an answer, until he pays or tenders the amount actually borrowed.

INJUNCTION ALREADY GRANTED WILL NOT BE DISSOLVED, in such a case, if an answer is put in without objection, if usury appears, and the complainant is still willing to pay what is really due.

EVADING THE STATUTE AGAINST USURY.—Covering up an usurious loan by a sale of land at an extravagant price is a devise to evade the statute, which will not be permitted to avail the lender in equity.

BILL for an injunction to restrain proceedings at law upon a certain mortgage. The facts appearing from the bill were: The complainant, being deeply indebted, applied to the defendant for a loan, which the defendant refused to make unless the complainant would purchase of him certain wild land at more than four dollars an acre. After some hesitation, the complainant consented, and gave the defendant a bond and mortgage including the amount of the loan, eight hundred dollars, and the agreed price of the land, five hundred and fifty dollars, with interest payable annually. An action on the bond and proceedings under the statute for the foreclosure of the mortgage were commenced. The complainant offered to pay the actual amount of the loan with compound interest, and to reconvey the land, which the defendant refused, but offered to deduct two hundred dollars from the mortgage, if the complainant would pay the residue. This bill was then filed to stay the proceedings at law, and the offer to repay the amount actually borrowed with compound interest was repeated. An injunction having been granted, the defendant now moved to dissolve the same, having put in his answer.

A. Stewart, for the complainant, contended: 1. That compelling a necessitous borrower to take with the loan land or other property above its value, against his will, is usury both at law and in equity: *Eagleson v. Shotwell*, 1 Johns. Ch. 536;

Rose v. Dickson, 7 Johns. 196; *Stuart v. Mechanics and Farmers' Bank*, 19 Id. 509; 2. That the court will not require the sum actually due to be brought in before granting relief to the debtor in such a case, if he has offered to pay it: *Eagleson v. Shotwell*, 1 Johns. Ch. 536; *Fanning v. Dunham*, 5 Id. 144 [9 Am. Dec. 283]; *Thompson v. Berry*, 3 Id. 398; 3. That even if there was only mistake or ignorance as to the value of the land, equity would grant relief: *Bingham v. Bingham*, 1 Ves. sen. 126, per Lord Hardwicke; 1 P. Wms. 355.

L. Beardsley, for the defendant, insisted: 1. That to constitute usury there must be a corrupt agreement, which was not proved in this case: *Nourse v. Prime*, 7 Johns. 77; *New York Firemen Ins. Co. v. Ely*, 2 Cow. 678; *Clason v. Morris*, 10 Johns. 535; 2. That although any device to get more than interest is usury: *Rose v. Dickson*, 7 Johns. 196; *Eagleson v. Shotwell*, 1 Johns. Ch. 536; *Dunham v. Gould*, 16 Johns. 36 [8 Am. Dec. 323]; yet usury is not to be presumed, but proved: *McGuire v. Parker*, 1 Wash. 368; and a *bona fide* sale of property, at however high a price, is not usury: *Skipwith v. Gibson*, 4 Hen. & Munf. 490; *Greenhow v. Harris*, 6 Munf. 472 [8 Am. Dec. 751]; *Bull v. Douglass*, 4 Id. 303 [6 Am. Dec. 518]; *West v. Belches*, 5 Id. 187; though it is otherwise if the property is forced on the borrower: *Stuart v. Farmers and Mechanics' Bank*, 19 Johns. 496, 508, 509; *Lowe v. Waller*, Doug. 708; 3. That in any event, the injunction could not be sustained, because the complainant had not brought into court the actual sum borrowed and interest: *Rogers v. Rathbun*, 1 Johns. Ch. 367; *Tupper v. Powell*, Id. 439; *Fanning v. Dunham*, 5 Id. 122 [9 Am. Dec. 283].

The CHANCELLOR. The objection that the complainant has not brought into court the amount admitted to be due, with legal interest, can not be received in this stage of the cause. As a general rule, a party who comes here to seek relief against a usurious contract, must pay or offer to pay the amount actually due before he will be entitled to an injunction, or to an answer as to the alleged usury. But if he answers the bill without making any objection on that ground, the court will not afterwards dissolve the injunction, if it appears there is usury, and if the defendant is then willing to pay the sum really due. If a party comes here to seek equity, the court will compel him to do equity. In this case the complainant offered to pay the whole amount loaned, with compound interest; and the defendant refused to receive it. Under such circumstances, it

was not necessary to make a formal tender of the money. The same offer is repeated in the bill, and the court has power to compel him to make it good, whenever the defendant consents to accept of those terms. The actual payment of the money, under such circumstances, was not necessary.

The only question in this cause, therefore, is, whether the defendant is entitled to hold this mortgage for its whole nominal amount. It is alleged in the bill that this land, which was, in a measure, forced upon the complainant at nearly four and a half dollars per acre, was not in fact worth one at the time of the sale. The answer to this is that the defendant knows nothing of its value, except what is contained in his father's letter, etc., and he fixed it at a price not exceeding three dollars per acre. If the defendant knew, or had reasons to believe, he was getting more for his land than any one would be willing to give him for it, unconnected with a loan of money, he was in fact selling it for a price above its actual worth, whatever he might have considered its nominal value. From the answer in this case no one can doubt that the necessities of the complainant induced him, for the sake of obtaining the loan, to give for this land a sum much beyond what it was actually worth to him. And the defendant, by this device, did in fact obtain more than seven per cent. advantage from the loan of his money. The statute can not be evaded in this way; and no device of this kind can be permitted to avail the lender, without in effect repealing the laws against usury. As to the policy of those laws, the court have nothing to do. So long as the legislature thinks proper to continue them on the statute book, it is our duty to see them faithfully executed. It might perhaps be beneficial to the borrower in some cases, if he were permitted to stipulate directly to allow a premium above the legal rate of interest; but some limitation is absolutely necessary to protect the necessitous against their own improvidence, and the cupidity of avarice.

The motion to dissolve the injunction must be denied with costs, unless the defendant consents to receive the money loaned, and legal interest, together with a reconveyance of the land, and to pay the costs already accrued in this suit. If he consents to those terms, the complainant must pay the amount due and execute the conveyance within sixty days after notice of such acceptance, or the injunction must be dissolved.

USURY.—Selling property to a needy borrower at an exorbitant price will

be looked on as a shift to evade the statute: *Dowdall v. Lenox*, 2 Edw. Ch. 273. A borrower coming into equity to set aside a usurious conveyance must pay the amount actually borrowed: *Williams v. Fitzhugh*, 37 N. Y. 453. Both cases refer to the foregoing decision as authority. It is also cited in *Schermerhorn v. American Life Ins. and Trust Co.*, 14 Barb. 148.

IN THE MATTER OF THE RECEIVER OF THE MIDDLE DISTRICT BANK.

[1 PAIGE CH. 585.]

EQUITABLE SET-OFF NOT AFFECTED BY APPOINTING RECEIVER.—The appointment of a receiver of a bank does not affect the right of its debtors to set off demands held by them against the bank when it stopped payment.

DEBT WHICH BECOMES DUE AFTER THE STOPPAGE of payment may be set off.

INDORSER HAS THE SAME RIGHT OF SET-OFF in such a case as the principal debtor, if he is unindemnified and is compelled to pay because the principal can not; but not otherwise.

OVERDRAWING IS A DEBT due the bank, and bills held *bona fide* when the bank stopped payment by the person so overdrawing may be set off against such debt.

BILLS OBTAINED BY A DEBTOR AFTER THE STOPPAGE of payment of a bank can not be set off against debts due it.

APPLICATION by the receiver of the Middle District Bank for instructions respecting his duties. The questions submitted sufficiently appear from the opinion.

THE CHANCELLOR. In the case of *Miller v. The Receiver of the Franklin Bank*, 1 Paige's Ch. 444, this court decided that any equitable set-off, which the debtor had at the time the bank stopped payment, was not altered by the appointment of a receiver. It makes no difference whether the debt of the bank was then payable or has become due since. If a debtor claims to offset bills which were then in the hands of any other person for his use, the receiver should be satisfied he was the real owner of the bills at that time; and if the amount due thereon is lost, that the loss will legally and equitably fall on such debtor, and not upon the person who had them for his use. If the real debtor is unable to pay, and the receiver is compelled to resort to the indorser, who is eventually to be the loser, he has the same equitable claim to offset bills which he had at the time the bank stopped payment. But no such offset should be allowed to an indorser where he is indemnified by the real debtor, or where the latter can be compelled to pay. An overdrawing is a debt due to the bank, and if the person who has

overdrawn his account was, at the time the bank stopped payment, a *bona fide* holder of the bills in his own right, the same rule of set-off must be applied. The evidence on which the receiver should act in allowing set-offs should be such as to satisfy him that the debtor could sustain such offset in a court of justice if a suit was brought against him. If the receiver thinks proper to rely upon the affidavit of the party, he should at least require him to state when, where, and from whom he received the bills, and under what circumstances.

Where the debtors and their sureties are insolvent, and only able to pay a part of their debts, it will be no injury to the creditors of the institution if the receiver takes Middle District bills in payment; but in all such cases the receiver should estimate such bills at the probable amount of dividend which would be obtained thereon; that is, if the debtor is able to pay seventy-five per cent. of his debt, he should not be permitted to pay in bills at par, when they are in fact worth less than seventy-five per cent. in good money. In one of the suits brought by the receiver of the Greene County Bank, the supreme court decided, after full argument, that under the provisions of the act of 1825, bills which had been obtained by the debtors of the bank after it stopped payment, but before the appointment of a receiver, could not be offset; that the equitable right of the debtors to a set-off was not altered by the neglect of the attorney-general to apply for and obtain the appointment of a receiver immediately. This must be considered the legal rule by which the receiver is to be governed. It having been decided there was no offset at law in such cases, there can be no pretense for claiming it in equity, as it is wholly opposed to every principle of equity and justice.

If bills of the bank were taken to exchange, and remained on hand at the time the bank stopped payment, they should be returned; but if the agent had parted with the bills, it would be manifestly unjust to allow him to receive Middle District bills afterwards to offset.

Referred to as authority for the position that a demand becoming due before the appointment of a receiver, may be set off against a demand in favor of the receiver maturing afterwards: *Pardo v. Osgood*, 2 Abb. Pr. N. S. 367, 368.

EDMESTON v. LYDE.

[1 PAIGE CH. 637.]

BILL REACHING DEBTOR'S EQUITABLE ESTATE.—After a return of his execution unsatisfied, a creditor may reach his debtor's equitable estate, either by filing a bill in his own name, or in behalf of himself and all other creditors in a like situation who may choose to come in under the decree, or by joining in a suit with such other creditors.

CREDITOR OBTAINS A SPECIFIC LIEN ON THE EQUITABLE ESTATE of the debtor in such a case, not by the return of his execution unsatisfied, but by commencing his suit afterwards.

SUBSEQUENT ASSIGNMENT BY THE DEBTOR does not divest the lien so acquired.

FRAUDULENT ASSIGNEE MUST BE A PARTY, WHEN.—Where a debtor has fraudulently assigned property, so that he has no legal or equitable claim against the assignee, the latter must be made a party to the suit to reach such property.

ASSIGNEE NEED NOT BE A PARTY, WHEN.—A legal or equitable interest retained by the debtor in such a case, may be transferred to the complainant or to a receiver under the decree of the court, and the assignee need not be a party.

WHAT PROPERTY MAY BE SOLD UNDER DECREE.—Every species of property of a debtor, including debts, choses in action, and equitable rights, may be reached and sold under a decree of this court, and the purchaser will be protected.

BILL by creditors to reach certain equitable estate of their debtors. The complainants, having obtained judgment against the defendants, for a large sum, and issued execution thereon, and the same having been returned unsatisfied, filed this bill, setting out the facts and seeking a discovery and satisfaction of their judgment out of property which could not be reached at law. The answer admitted the facts stated and that the defendants were insolvent; that certain real estate of theirs had been sold on execution and purchased for their benefit by one Buckner, subject to a lien for his advances; and that they held his written acknowledgment of the trust. The answer also contained a statement of sundry choses in action belonging to the defendants, and stated that there were certain judgment-creditors prior to the complainants who, together with the said Buckner, should have been made parties. The cause was held on the bill and answer.

R. Sedgwick, for the complainants.

G. Griffin, for the defendants.

The CHANCELLOR. The first question in this case is as to the right of the other judgment-creditors of the defendants, and

whether they are necessary parties. It might be sufficient, in this case, to say they do not stand in the same right with the complainants, as it does not appear by the answer that executions in those causes have been actually returned unsatisfied, which was necessary to give them any right to come into this court for relief: *Beck v. Burdett*, 1 Paige's Ch. 305 [*ante*, 436]. But it may be useful to inquire whether they would be necessary parties, even if that fact was distinctly alleged in the answer. I have once had occasion to examine this question elsewhere, and the conclusion to which I arrived was, that the creditor whose execution at law was returned unsatisfied, might file a bill to reach the equitable estate of the defendants, either in his own name and for his own benefit, or might join with others standing in the same situation in a joint suit for their joint benefit, in proportion to the amount due to each, as in the case of *McDermutt and others v. Strong*, 4 Johns. Ch. 687, or that he might file a bill in the usual way, in behalf of himself and all others standing in the same situation, as judgment-creditors whose executions had been returned unsatisfied, and who might choose to come in under the decree, and contribute to the expenses of the suit. I can see no reasonable objection to either mode of proceeding. The latter, at the first blush, may appear the most equitable, but the two first are much more likely to insure a vigilant prosecution of the suit. And, on further examination, it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit.

The case of *McDermutt and others v. Strong* does not sanction the idea that a party obtains any specific lien upon the equitable estate of the debtor by the return of an execution unsatisfied. But by that act he puts himself in a situation to obtain a specific lien by the commencement of a suit here. In that case, the complainant's executions had been returned unsatisfied, and their suit in this court had been pending several months before the debtor conveyed his property to the defendants as his assignees under the insolvent act, and the complainants had also given notice to the original trustee that they intended to seek satisfaction out of the trust fund by the aid of this court. Under these circumstances, the chancellor very properly decided that by their legal diligence the complainants had obtained a specific lien upon

the fund, which entitled them to a preference. But it is evident he did not consider the issuing of the executions as giving any priority; for the execution of one of the complainants was issued in May, and the other in June; yet the decree in that case provided that if the fund was not sufficient to satisfy both judgments, it should be distributed among the complainants ratably, in proportion to the amount due to each. Where the property is not levied on by the execution, or where, from its nature, it could not be reached by any execution at law, the return of the execution unsatisfied does not give to the creditor any specific lien. He must follow up his execution by the commencement of a suit here, before he can obtain any claim to a priority. The creditor whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance. In *Edgell v. Haywood*, 3 Atk. 357, Lord Hardwicke says: "The court does not proceed in this case on the ground of a specific lien, but only considers it a part of the property of the debtor, which the creditor can not come at without the aid of this court. If, therefore, after judgment, or even after the *fiery facias* had been issued, the debtor had assigned this *bona fide*, and for a valuable consideration, and without notice, it would be good and prevail against this creditor. But after a bill brought and a *lis pendens* created as to this thing, such assignment could not prevail." So in the case of *Spader v. Davis*, 5 Johns. Ch. 280, the holder of a fund under an assignment which was fraudulent in law, was held accountable only for so much thereof as remained in his hands at the time of the commencement of the suit in this court. If the creditor whose execution is first returned unsatisfied, pursues the race of legal diligence, by the commencement of a suit here, he will obtain the reward of his vigilance; but if he abandons the pursuit, or lingers on the way before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance. The other judgment-creditors were not necessary parties, and the complainants are entitled to a preference in payment out of the equitable assets which belonged to the defendants at the time of the commencement of this suit.

Neither was Buckner a necessary party. Where the property has been fraudulently assigned by the debtor so that he has no legal or equitable rights as against the assignee, it will be necessary to make the assignee a party, to enable the court to reach the property in his hands. A decree against the fraudulent assignor would not, in that case, give any right to the property in

the hands of the assignee. But where the debtor still retains the legal or equitable interest in the property, such interest may be conveyed to the complainant, or transferred to a receiver, under the decree or order of this court, who can call upon the debtor or trustee of the defendant in the same manner as the defendant himself might have done previous to the filing of the bill. As there is no allegation of fraud as to Buckner, if he was made a defendant, he would be entitled to the advances which he has made, together with his costs. If all the right of the defendants is sold under a decree in this suit, the purchaser will be entitled to an assignment of the land from Buckner, on paying the amount due. And if he should unreasonably refuse to permit the purchaser to redeem, he might subject himself to the costs of a suit instituted for that purpose. The debts, choses in action, and other equitable rights of the defendants may be assigned or sold, under the decree of this court, so as to vest an equitable interest in the purchaser, which will be protected both here and at law. The court of exchequer in England has gone so far as to compel the purchaser of a debt due to a bankrupt's estate to perform his contract specifically: *Wright v. Bell, Daniels' R. 95*.¹ The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of this court are perfectly adequate to carry that principle into full effect. The only difficulty is in deciding which of the various powers of the court is best adapted to the end; which will be the most convenient and least expensive to the parties. This must, in a great measure, depend upon the nature of the property to be reached. I shall not, therefore, for the present, undertake to lay down any general rules on the subject except one which is perfectly obvious. If the property is of such a nature that its fair value may be obtained by a sale at auction, in the usual manner, that course should be resorted to as the most expeditious and least expensive. The principal property in this case is an equitable right to certain real estate, subject to the payment of the advances made by Buckner thereon. If that is sufficient to satisfy the complainants' debts and costs, no further proceedings will be necessary as to the other property of the defendants. There must, for the present, be a decree declaring the rights of the complainants, and providing for the sale of that property, reserving further directions. The following decree was entered:

1. *Wright v. Bell, Daniell (Ex.)*, 95; S. C., 5 Price, 326.

“This cause having been brought on to be heard on bill and answer, and on hearing Mr. R. Sedgwick, of counsel for the complainants, and Mr. G. Griffin, of counsel for the defendants, and the chancellor having duly considered the same, it is this day adjudged and declared, and this court, by virtue of the power therein vested, doth adjudge and declare, that the complainants are entitled to the proceeds of all the choses in action, stocks, property, estate, and effects of the defendants, either in law or equity, in possession, reversion, or remainder, or held in trust for them or either of them, and which belonged to them or either of them, or in which they had any interest in law or equity at the time of the commencement of this suit; or to so much of the said proceeds as may be necessary to satisfy the amount due on their judgment against the defendants, in the pleadings in this cause mentioned, with the lawful interest thereon, and their costs in this suit to be taxed. It is therefore ordered and decreed that the defendants be enjoined from collecting, receiving, disposing of, or intermeddling with any of the said choses in action, stocks, property, estate, or effects, or the proceeds thereof, except so far as is necessary to preserve the same from waste or loss, until the amount of the said judgment, with the interest and costs aforesaid, is fully satisfied, or until the further order of this court.

“And it is further ordered and decreed that all the right and interest of the said defendants, either in law or equity, to the lots or parcels of land, with the buildings thereon mentioned or referred to in the receipt of William Goelet Buckner, mentioned and set forth in the defendants’ answer in the cause, together with all their right and claim against the said Buckner for or on account of the said lots or of the said receipt, be sold at public vendue, by or under the direction of one of the masters of this court, at the Merchants’ Exchange in the city of New York, the said master giving three weeks’ public notice of the time and place of such sale, in one of the public newspapers in the city of New York, at least once in each week; and that previous to the said sale, the said master ascertain, as near as may be, the amount advanced by the said Buckner to the defendants on account of the said receipt; and that he have liberty to examine the defendants or any witnesses on oath for that purpose, if he shall deem it necessary; that the sale be made at the risk of the purchaser for cash, and that the complainants be at liberty to become purchasers on such sale; that the master execute a conveyance or assignment to the purchaser in such

form as the master may think proper, and that the defendants, if required by the purchaser, join in the said conveyance or assignment, as the master may direct; and that they be required to stipulate therein that the purchaser be at liberty to use their names, if he shall deem it necessary, in any suit or proceedings in relation to the subject-matter of the said sale, he giving to them such indemnity against the costs of any such suit or proceedings as may be directed by this court previous to the commencement of any such suit or proceeding; and that the master pay to the complainants or their solicitor, out of the proceeds of the said sale, their costs of this suit to be taxed, and also the amount of their said judgment, with lawful interest thereon, or so much as the purchase money will pay of the same, and that the master take a receipt for the amount so paid and file the same with his report; and that he bring the surplus moneys arising from the said sale, if any there be, into court without delay, to abide the further order of the court. And it is further ordered, that if the moneys arising from the said sale are not sufficient to pay the amount due on the said judgment, with interest and costs as aforesaid, the said master ascertain the amount of such deficiency and specify the same in his report; and that on the coming in and confirmation of the said report, the complainants may apply to this court for such further directions as may be necessary or proper in relation to such deficiency. And in the mean time either party is to be at liberty to apply to this court, from time to time, as they may be advised, in relation to the said property or effects of the defendants, or the preservation or disposition thereof, or the collection of the debts."

See the note to *Donovan v. Finn*, 14 Am. Dec. 542.

JOHNSON v. PINNEY.

[1 PAIGN OR. 646.]

APPLICATION OF A PARTY IN CONTEMPT FOR A FAVOR, and not for a matter of strict right, will not be granted until he has purged himself of the contempt.

COMPLAINANT NEED NOT ACCEPT THE ANSWER OF A DEFENDANT IN CONTEMPT for not answering, but if he does so without insisting on his costs, he can not afterwards object that they have not been paid.

APPLICATION by the defendant after an order entered by the complainants' solicitor, closing the proofs in the cause, for a

commission to take the testimony of a witness whose residence had not been previously discovered. The application was based on an affidavit of merits. It was resisted on the ground that the defendant was in contempt for not paying costs on a previous motion for a dissolution of the injunction in this suit.

M. P. Reynolds, for the defendant.

J. Rhoades, for the complainants.

THE CHANCELLOR. It is a general rule that a party can not apply to the court for a favor while he is in contempt: *Voules v. Young*, 9 Ves. 173; *Prac. Reg.* 138; *Green v. Thomson*, 1 Sim. & Stu. 121. And the complainant is not obliged to accept an answer until the party has cleared his contempt for neglecting to appear or answer. If the party does not insist upon his costs, but accepts the answer and proceeds thereon, he can not afterwards object that those costs have not been paid: *Anonymous*, 15 Ves. 174; *Smith v. Blofield*, 2 Ves. & B. 100. In this case the proofs have been regularly closed. The defendant is in contempt for not paying the costs of a former motion which failed. An attachment was issued for the costs, but they have not been paid. The favor now asked of the court ought not to be granted until the defendant clears himself of his contempt by the payment of those costs. I do not intend to be understood as applying this principle to an application which is a matter of strict right; as a motion to set aside proceedings for irregularity; or to dismiss a bill for want of prosecution.

The motion for leave to examine this witness must be granted without prejudice to the complainants' right to proceed to a hearing the first opportunity. But the order for leave is only upon payment of the costs of opposing this motion; and the costs necessary to be paid to purge the defendant's contempt.

THAT AN APPLICATION BY ONE IN CONTEMPT to the favor of the court will not be heard until the contempt is purged, this case is cited in *Ellingwood v. Stevenson*, 4 Sandf. Ch. 368; *Rogers v. Paterson*, 4 Paig. 455; *Krom v. Hogan*, 4 How. Pr. 226; *Field v. Chapman*, 13 Abb. Pr. 330.

C A S E S
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW YORK.

MUMFORD *v.* BROWN.

[1 WENDELL, 52.]

TENANT IN COMMON HAVING RENTED HIS CO-TENANT'S HALF of the premises is not liable for double rent for holding over after the expiration of the term, and after notice to quit, where he has previously offered his co-tenant possession of half.

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ERROR to the common pleas to reverse a judgment of nonsuit in an action for double rent under the statute, appealed to that court from the justice before whom it was originally brought. It appeared from the bill of exceptions that the parties were tenants in common of a certain house and lot, and that the defendant, having been in sole occupation of the same for one year under an agreement to pay the plaintiff a certain rent therefor, continued in possession for some time after the term. The remaining facts are stated in the opinion.

By Court, SAVAGE, C. J. That this action lies by one tenant in common against another, has been decided in England. That point does not, however, necessarily arise, as the facts, in my judgment, do not warrant the action. A few days previous to the expiration of the term, the plaintiff's agent called with a written demand of the possession. Before the term expired, the defendant offered possession of half, which was all the plaintiff demanded or was entitled to. The agent refused having anything to do with it. The defendant remained in possession, as he had a right to do, unless the plaintiff came to receive possession. They were tenants in common. The defendant certainly offered to give possession, and did not act at variance with that

offer. He was not bound to abandon the possession, nor to make partition and occupy one half. His possession of the whole was lawful, as he did not prevent his co-tenant from occupying with him. The court below decided correctly.

Judgment affirmed.

POSSESSION BY TENANT IN COMMON.—In *McKay v. Mumford*, 10 Wend. 352, it was held, following the doctrine of the foregoing decision, that as each tenant in common is entitled to the possession, if one take a lease from his co-tenant at a specified rent, and hold over after the expiration of the term, he will be considered as holding, not under the lease, but under his own prior title, and will not be liable for use and occupation. The principal case is cited, also, in *McGarrell v. Murphy*, 1 Hilt. 133, to the point that the possession of a tenant in common is not unlawful, if he does not prevent his co-tenant from occupying with him; and in *King v. Phillips*, 1 Lana. 430, to the point that such possession by one tenant in common does not give his co-tenant a right of action, unless the latter is ousted or his property put off the premises.

ACTION AGAINST CO-TENANT FOR RENTS AND PROFITS.—This subject is considered in the note to *Chambers v. Chambers*, 14 Am. Dec. 586.

OUSTER BY CO-TENANT.—See, on this point, the note to *Gillaspie v. Osborn*, 13 Am. Dec. 140.

HAWKINS v. TRUSTEES OF ROCHESTER.

[1 WENDELL, 68.]

PROCEEDINGS IN LAYING OUT STREET—DISCONTINUANCE.—After a verdict of a jury and the judgment of the proper officer thereon, a party has a vested right in damages awarded him in consequence of laying out a street, and the trustees of the town can not defeat that right by discontinuing the proceedings.

ACTION of debt on *mutuatus*, to recover two hundred dollars, awarded to the plaintiff for land taken in opening a street in the village of Rochester. It appeared, from a case submitted for the opinion of the court, that a resolution was passed by the trustees for opening the street; that a jury, impaneled to assess the damages to property owners, duly rendered their verdict, awarding the plaintiff the sum now claimed by him; that the president of the village gave judgment approving the said verdict; that assessors were appointed to assess the sums allowed as damages upon the property owners to be benefited by the improvement; but that, on the coming in of the report, the trustees, in obedience to a petition of the property owners interested, passed a resolution discontinuing and setting aside all proceedings in relation to said street, and that the plaintiff's land was never taken possession of, or appropriated. Judgment was to be rendered for the plaintiff if the board had no right to discontinue the proceedings; otherwise for the defendants.

F. Whittlesey, for the plaintiff.

B. Beach, for the defendants.

By Court, SUTHERLAND, J. The plaintiff, by the verdict of the jury and the judgment of the president of the village thereon, acquired a vested right to the sum awarded to him as damages, which it was not in the power of the trustees to defeat by discontinuing the proceedings in relation to the street. The power of the trustees, under the twenty-fifth section of the act "to incorporate the village of Rochester," statutes, vol. 7, b. 125, passed April 10, 1826, is analogous to that of the corporation of New York in opening and laying out streets: 2 R. L. 408. *In the matter of Dover Street*, 18 Johns. 506, the corporation were permitted to discontinue their proceedings. Commissioners of estimate and assessment had been appointed, but they refused to act, and the court considered the case standing in the same condition as though no commissioners had ever been appointed; and they say, before commissioners are appointed, or report made, we do not perceive how any rights can be so vested as to deprive the corporation of the power of refusing to go on. But *In the matter of Beekman Street*, 20 Johns. 269, the court refused leave to the corporation to discontinue their proceedings, commissioners having been appointed, and being nearly ready to report, though no report had actually been made. The principle adopted in these cases is applicable to that now under consideration, and is decisive in favor of the plaintiff's right to recover.

Judgment for plaintiff.

In Matter of Anthony Street, 20 Wend. 620; *Hawkins v. Rochester* is referred to as authority for the position that no vested right is acquired under proceedings in relation to opening and laying out streets until the confirmation of the final report of the commissioners of estimate and assessment. See, on the same point, *People v. Brooklyn*, *post*. The principal case is cited also in *People v. Green*, 20 How. Pr. 497, as approving the decision in *Matter of Beekman Street*, 20 Johns. 269, with respect to the power to discontinue proceedings in such cases.

MARSHALL v. DAVIS.

[1 WENDELL, 109.]

REPLEVIN LIES WHEREVER TRESPASS *de bonis asportatis* would lie.

WRONGFUL TAKING from the actual or constructive possession of the plaintiff is necessary to support trespass or replevin in the *cepit*.

WRONGFUL DETAINER AFTER A LAWFUL TAKING is not equivalent to a wrongful original taking.

DELIVERY BY A BAILEE WITHOUT AUTHORITY to one who is ignorant of the owner's rights does not constitute such a wrongful taking of a chattel by the party so receiving it as to support replevin.

WIFE OF THE BAILEE IS A COMPETENT WITNESS in such a case because the bailee's interest is balanced, he being liable in any event.

ERROR to the common pleas, in an action of replevin brought by Davis, the defendant in error, for the taking of a certain horse. It was proved for the plaintiff that he purchased the horse of one Gumaer and gave him to one Vermilyea to use for his keeping, reserving the right to resume possession when he pleased; and that Vermilyea delivered him to the defendant in exchange for another horse, but that since the replevy the defendant had got possession of the horse given in exchange to Vermilyea, and that before the action, possession of the horse received from Vermilyea was demanded and refused. The defendant moved for a nonsuit, which was refused. The defendant then offered Vermilyea's wife as a witness to prove that Vermilyea purchased the horse from Gumaer, and that the plaintiff, being his surety, had given him leave to sell or exchange the horse. The court excluded her as incompetent because of the interest of her husband. Verdict and judgment for the plaintiff, which this writ was brought to reverse.

A. C. Niven, for the plaintiff in error, claimed: 1. That replevin would not lie, because there was no tortious taking: *Morgan's Vade Mecum*, 70, 72; *Selwyn's Nisi Prius*, 1110; *Gilb. Replev.* 58; *Com. Dig., Replev. (a)*; 1 *Chit. Pl.* 118; 1 *Esp.* 216; *Pangburn v. Patridge*, 7 *Johns.* 141 [5 *Am. Dec.* 250]; *Clark v. Skinner*, 20 *Id.* 467 [11 *Am. Dec.* 302]; 2. That Mrs. Vermilyea was a competent witness, her husband's interest being balanced.

L. Jenkins, for the defendant in error, contended: 1. That the plaintiff, being the owner and entitled to the possession, was constructively in possession, and could maintain the action: *Clark v. Skinner*, 20 *Johns.* 465 [11 *Am. Dec.* 302]; 2. That there was an unlawful taking, and that, at all events, the unlawful detention was enough to support the action: *Badger v. Phinney*, 15 *Mass.* 359 [8 *Am. Dec.* 105]; 16 *Id.* 147; 1 *Chit. Pl.* 48; 2 *Saund.* 47, b; 7 *T. R.* 12; 3. That the ruling as to the competency of the bailee's wife as a witness was correct, because a recovery by the plaintiff would be conclusive evidence against her husband on his implied warranty of title to the defendant: 1 *Johns.* 517; 2 *Id.* 394; 6 *Id.* 5, 523; 1 *Johns. Cas.* 163; 2 *Id.* 314.

By Court, SAVAGE, C. J. The questions in this case are: 1. Whether, on the plaintiff's own showing, the action of replevin can be maintained? and 2. Whether Mrs. Vermilyea was a competent witness?

1. The old authorities (says Van Ness, J., in *Pangburn v. Patridge*, 7 Johns. 143 [5 Am. Dec. 250]) are that replevin lies for goods taken tortiously, or by a trespasser; and that the party injured may have replevin or trespass at his election. To maintain this position, the year books and several ancient and modern authorities are cited. In *Thompson v. Button*, 14 Johns. 27, Chief Justice Thompson says: "The utmost extent to which the case of *Pangburn v. Patridge*, can be carried, is, to permit replevin to lie where an action of trespass might be brought: *Gardner v. Campbell*, 15 Johns. 402, was an action of replevin, in which the defendant justified under an execution, and to which the plaintiff pleaded pleas of payment and satisfaction. To these pleas there was a demurrer and joinder. Spencer, J., in delivering the opinion of the court, says: "The first objection to the pleas is, that they admit the original caption to be lawful, and where that is the case, replevin does not lie." In concluding his opinion, he again remarks: "The goods were lawfully taken by the defendant, and replevin is not the appropriate remedy." In *Mills v. Martin*, 19 Johns. 31, 32, Platt, J., and Spencer, C. J., repeat the doctrine, that where the taking was tortious, and for which trespass would lie, there replevin would also lie. In *Clark v. Skinner*, 20 Johns. 467 [11 Am. Dec. 302], Mr. Justice Platt reiterates the same doctrine, and applies it to the case of taking, not only from the actual, but constructive possession of the plaintiff; and contends that the true rule is, that replevin will lie where trespass will. This is, undoubtedly, the correct rule, that replevin will lie in all cases where trespass *de bonis asportatis* can be maintained. And in trespass it is well settled that the plaintiff must have either actual possession, or property and constructive possession; by which is meant, the right to redeem the article to his possession at pleasure. According to the testimony in this case, the plaintiff was the general owner of the horse in question, and had the constructive possession; he had a right to take actual possession at any moment when it was his pleasure to do so.

The next inquiry is, whether the taking by the defendant was unlawful, or, in the language of the law, tortious. Vermilyea was not the servant of the plaintiff. He was bailee; he kept the horses for the plaintiff, and had the use of them to pay for

their keeping. He had no authority to sell, or exchange the horses. He, however, had the actual possession; and, for aught appearing in the case, the defendant believed him to be the owner. The defendant took the horse, by delivery of Vermilyea, professing to be the owner, and to have the right of disposing of him. The taking was, in fact, without authority, as Vermilyea had no authority to dispose of the horse, and was therefore unlawful. That the defendant was ignorant of the plaintiff's rights, and, therefore, innocent of any fraudulent intent, does not alter the rights or liabilities of the parties in relation to each other. Mr. Tidd, in his division of actions, says: Replevin lies to recover damages for an immediate wrong, without force, in taking away and detaining cattle or goods, and answers to the action of trespass *de bonis asportatis*. Trespass *vi et armis* lies to recover damages for immediate wrongs accompanied with force: 1 Tidd's Pr. 7. In the case of *Mearey v. Head*, 1 Mason, 322,¹ Mr. Justice Story says: "At common law a writ of replevin never lies unless there has been a tortious taking, either originally or by construction of law, by some act which makes the party a trespasser *ab initio*. In case of the bailment, or rightful possession of the property, replevin is certainly not the proper remedy at common law; but detinue or trover lies in such case, where there is an unjustifiable detention or conversion." He further adds: "*Non cepit* puts in issue the fact of an actual taking; and unless there be a wrongful taking from the possession of another, it is not a taking within the issue." These remarks were made in an action of replevin. The plaintiff was the owner of the goods in question, and had consigned them to one Green for sale. Green deposited them in the store of the defendant for safe keeping. Green failed, and a creditor of his sued the defendant as trustee of Green. The defendant refused to deliver them to the plaintiff on demand, and on suit being brought, pleaded property in Green. The learned judge further remarks, that under the circumstances of that case, if the issue had been *non cepit*, it must have been found for the defendant, for he never took the goods, in any legal sense, from the possession of another. He received them on storage, and the delivery to him was a lawful delivery upon a bailment for safe keeping. *Non cepit* put in issue the facts of an actual taking; and unless there be a wrongful taking from the possession of another, it is not a taking within the

1. *Meany v. Head*, 1 Mason's C. C. 322.

issue. A wrongful detainer, after a lawful taking, is not equivalent to a wrongful original taking.

The doctrine of the supreme court of Massachusetts is more liberal in favor of the action. Parsons, chief justice, says, in *Bailey v. Stubbs*, 5 Mass. 284.¹ As a general principle, the owner of a chattel may take it by replevin from any person whose possession is unlawful, unless it is in the custody of the law, or unless it has been taken by replevin from him, by the party in possession. In *Badger v. Phinney*, 15 Mass. 359 [8 Am. Dec. 105]; it was held that replevin lies for goods unlawfully detained, though there was no tortious taking. In that case the goods replevied were sold by the plaintiff to the defendant's intestate, an infant; and on his refusal to pay, on the ground of infancy, the plaintiff demanded the goods. The defendant refusing to give them up, replevin was brought, and it was held that this action lies, where the goods are wrongfully detained, though the original taking was lawful. This decision was made in March, 1819, and seems not to have been satisfactory to the bar; as in September of the same year, the question was again raised and argued at length in *Baker v. Fales*, 16 Mass. 147. But the court adhered to their former decision, and Putnam, justice, in a very able and learned argument, supports the propriety of their former adjudication on the same point. Were the question new in this court, I should be strongly inclined to hold the doctrine of the Massachusetts court correct, particularly under our statute to prevent abuses and delays in actions of replevin: 1 R. L. 91, by which it is enacted, "That if beasts, or goods, or chattels of any person, at an time hereafter, be taken and wrongfully detained, the sheriff, by writ of replevin, or upon complaint without writ, shall cause the same to be replevied," etc. But the question here seems to have been considered purely a common law question, and that as such, replevin is not the appropriate remedy, where the goods were legally taken, but illegally withheld, as in the case of *Gardner v. Campbell*. The decisions in this court place replevin on the same ground with trespass.

The title of the plaintiff was, no doubt, sufficient to maintain trespass, and it becomes important to inquire whether the taking by the defendant was such as to subject him to this action. I have not found any adjudged case in point; but in Bac. Abr., Trespass, c. 2, it is laid down as law, if the goods of J. S.,

1. *Bailey v. Stubbs*, 5 Mass. 284.

which were bailed to J. N., are taken from or injured in the hands of J. N. by a stranger, J. S., in whom the general property still remains, may maintain an action of trespass. But if the bailee of goods have delivered them to a stranger, the bailor can not maintain this action, because the general property in the goods is changed, by the delivery of a person who had a special property therein. So in Vin. Abr., Trespass, M, pl. 11, if I bail goods to a man who gives or sells them to a stranger, and the stranger takes them without delivery, I shall have trespass; for by the gift or sale the property is not changed, but by the taking; but, if the bailee delivers them to a stranger, I shall not have trespass. It seems, therefore, there was technically no taking of the property to subject the defendant to the action of trespass, he having obtained possession, by delivery, from a person having a special property therein; of course, replevin is not the proper remedy, but *detinue* or *trover*.

2. On the second point I think the court erred also. Vermilyea's interest was neutralized. If the plaintiff recovered, the defendant had his remedy against Vermilyea. If the plaintiff failed in this suit, then he had his action against Vermilyea. So that, let the decision be either way, Vermilyea was responsible for the value of the horse. His wife was a competent witness, as he would have been if offered.

Judgment reversed, *venire de novo* to Sullivan common pleas.

REPLEVIN LIES IN WHAT CASES.—See, on this subject, *Pangburn v. Patridge*, 5 Am. Dec. 250; *Badger v. Phinney*, 8 Id. 105, and note; *Kellogg v. Churchill*, 9 Id. 104, and note; *Gist v. Cole*, 10 Id. 616; *Clark v. Skinner*, 11 Id. 302; *Brown v. Caldwell*, 13 Id. 660; *Smith v. Huntington*, 14 Id. 331. The principal case is referred to in *Hall v. Tuttle*, 2 Wend. 478; *Dunham v. Wyckoff*, 3 Id. 261; *Rogers v. Arnold*, 12 Id. 32; and *McKnight v. Morgan*, 2 Barb. 176, as approving the doctrine of *Pangburn v. Patridge*, 5 Am. Dec. 250, that replevin will lie whenever trespass *de bonis asportatis* can be maintained. It is cited, also, to the point that possession and a wrongful taking are necessary to maintain replevin, in *Miller v. Adsit*, 16 Wend. 359; to the point that a taking by delivery from a bailee or other person having actual possession is not tortious, and that replevin in the *cepit* will not lie for such taking or for a subsequent illegal detention, in *Smith v. Clark*, 21 Wend. 85; *Rogers v. Weir*, 34 N. Y. 466; *Barrett v. Warren*, 3 Hill, 350; *Dudley v. Hawley*, 40 Barb. 505; but that replevin may be maintained by the owner for an absolute taking from the possession of such bailee or other person in actual possession, in *Acker v. Campbell*, 23 Wend. 374; and *Ely v. Ehle*, 3 N. Y. 506. In *Prosser v. Woodward*, 21 Wend. 207, *Marshall v. Davis* is cited also on this point, and it is intimated that replevin in the *detinet* may lie where there was no original tortious taking. It is referred to, also, in *Fuller v. Townsend*, 2 Denio, 186, as authority for the position, that the wife of the vendor of personal property is a competent witness to prove property in the vendee, where

the vendor will be equally responsible in any event, and in *Keaton v. Parks*, 2 Sandf. 64, as illustrating the general principle that a witness, whose interest is balanced, is competent.

POSSESSION TO MAINTAIN TRESPASS.—See, on this point, the note to *Orser v. Storms*, 18 Am. Dec. 546.

LE PAGE v. MCCREA.

[1 WENDELL, 164.]

SEVERANCE OF THE LIABILITY OF PARTNERS for their joint debts is not produced by an assignment under seal of the firm property to pay the debts on condition that the creditors will look to the partners individually for their proportion of the balance of the debts remaining unpaid, after dividing the property as assigned, unless the creditors accept the condition, and the partners individually covenant to pay their respective shares.

MERGER.—Where a partnership is indebted and the partners severally covenant to pay, each, his proportion of the debts, and the creditor thereupon releases the partners from their joint liability, the original contract or debt is merged.

NON-JOINDER OF PARTIES is matter for a plea in abatement.

PAYMENT BY A PARTNER, UNDER A COMPROMISE, of a specific sum in satisfaction of a partnership debt discharges it, and it can not be kept alive by an agreement between the creditor and the paying partner to enable the latter to collect it from his copartner.

ACCORD AND SATISFACTION.—Acceptance of a note of third persons, though for a less sum, in satisfaction of a debt, and payment thereof, constitute a good accord and satisfaction, and discharge the debt.

ASSUMPSIT against McCrea alone, for a debt alleged to be due the plaintiff from the late firm of McCrea & Slidell. The opinion states the facts. The judge charged the jury that the action should have been brought against McCrea & Slidell jointly, but that no advantage could be taken of it except by a plea in abatement; that the receipt given to Slidell, which was proved, was a valid accord and satisfaction, and discharged the debt as to both; that notwithstanding the assignment, made by the partners for the payment of their debts, on condition that the creditors should look to the partners individually for their proportion of the balance of such debts, and the release by the creditors, the partners nevertheless remained jointly liable until the partners individually executed some contract to pay their respective shares; that if the assignment itself made the partners individually liable, as it was under seal, and action of covenant only could be maintained thereon; that if the joint liability continued, the release of Slidell was the release of both, and if the partners had become separately liable it was by an

instrument under seal, and the plaintiff had mistaken his form of action.

P. W. Radcliff and Slosson, for the plaintiff, contended: 1. That by the assignment the joint liability of the partners was destroyed, and each, by his express agreement, became separately liable for his moiety, and this being the clear intent of the agreement, it should control the decision of the court: 2 Cow. 806; 5 Id. 170. 2. That *assumpsit* was the proper form of action, and that covenant would not lie, because the deed executed by the creditors in October, 1820, was not signed or sealed by the defendant: *Gale v. Nixon*, 6 Cow. 445; 1 Chit. Pl. 114, 348; 12 Johns. 197; 14 Id. 207. Much less would covenant lie on the assignment of September, 1820, there being nothing from which to infer a covenant, although a promise might be implied: 1 Johns. 34 [*Holmes v. De Camp*, 3 Am. Dec. 293]; 20 Id. 340; 2 Phil. Ev. 87; 13 East, 249; 5 Mau. and Sel. 65. 3. That the arrangement with Slidell was no accord and satisfaction, such not being the intent, and because payment of a part, without a release, is no satisfaction, a technical release being necessary to enable the defendant to treat it as a discharge: 7 Johns. 207; Gow. Part. 225-231.

H. Maxwell and J. Duer, for the defendant, claimed, among other things, that the deed of October was not a compliance with the condition of the assignment; that it was an acquittance and not a release, and that the debt, being an entirety, could not be released as to part: Shep. Touch. c. 19, Release 320-323; 5 Bac. Abr., Release, L; that the acceptance and subsequent payment of the note of John Slidell & Co. constituted an accord and satisfaction: 20 Johns. 76.

By Court, WOODWORTH, J. The plaintiff declared in *assumpsit* on the money counts. It appeared that the defendant and John Slidell, jun., were partners, and on the eleventh of September, 1820, made an assignment of their property to trustees, for the benefit of their creditors, containing a proviso that the creditors within one year assent to come in under the assignment, and agree to accept the individual responsibility of each partner for one half of their demands, and release the other half, engaging to look to each partner for a moiety of their respective demands. In the assignment, the plaintiff's debt is stated at two thousand seven hundred and twenty-seven dollars and ninety-six cents.

The defendant proved that on the twenty-fifth of October,

1825, the trustees paid to Slidell one thousand four hundred and forty-nine dollars and ninety cents, on a dividend on plaintiff's debts. This appears to have been done under the following authority: On the eighteenth of June, 1821, the plaintiff gave a letter of attorney to one Delonguemare, to receive all moneys due from McCrea and Slidell, to give acquittances, to compromise, conduct suits, and make substitution, etc. On the eighth of December, 1823, Delonguemare substituted Slidell as attorney in his place. It appeared that on the twenty-sixth of September, 1823, Delonguemare received from Slidell the note of John Slidell & Co., for one thousand two hundred dollars, at sixty days, to the order of John Slidell, junior, and gave a receipt, stating that when paid, Slidell was to be substituted for Delonguemare, as the attorney of the plaintiff, to recover of McCrea and Slidell, or the trustees, the plaintiff's debt; it being understood that on payment of the note, Slidell was entitled to recover and receive the debt from McCrea and Slidell to his own use, the note being given on a settlement by way of compromise.

On the fourteenth of October, 1820, an instrument was executed by the creditors, including the plaintiff by his attorney, Delonguemare, reciting the assignment, and agreeing with McCrea and Slidell to come in under the assignment, and accept the individual responsibility of each of the partners, for a moiety of their demands, after the final dividend of the estate by the trustees; and by the said instrument released all their demands beyond a moiety. It also contained a covenant that McCrea and Slidell, each for himself and not jointly, should take upon themselves individually a moiety of the copartnership debt, and to pay each the one half, and not to set up their joint liability in law or equity. This instrument was produced by the plaintiff, but it does not appear to have been executed by McCrea and Slidell, or either of them. It also appeared that on the twenty-fourth of October, 1822, the defendant presented a petition to the recorder, under the act for giving relief in cases of insolvency, in which the plaintiff's debt is stated at one thousand one hundred and fifty dollars, being one half of the debt due by McCrea and Slidell, deducting the plaintiff's interest arising from the assignment.

By the instrument bearing date October 14, 1820, the creditors agree to accept the individual responsibility of each partner. It was contemplated that each partner should become individually bound. In what manner they were to obligate

themselves, and at what time, is not stated. Until the partners had given their individual security, it appears to me there was no severance, but the demands of the creditors were against McCrea and Slidell jointly. There is no evidence that they ever assumed the payment of a moiety individually. The creditors also release each of the partners of all their demand beyond a moiety. The intention appears to have been, that as to a moiety of the debts, the creditors were willing to accept whatever dividend might be made under the assignment, and, for the residue, look to the partners separately. The creditors only executed the instrument; I do not, therefore, perceive that an action could be maintained on this covenant against either of the partners. If they had executed the instrument, the proper action to recover a moiety would be on the covenant. Its execution by McCrea and Slidell would necessarily have merged the original contract. If, then, this action can be defended, it must be on other grounds.

It has been correctly said that the non-joinder of all the parties is matter for a plea in abatement. It remains, then, to decide the effect of the settlement made between Slidell and Delonguemare, the attorney for the plaintiff.

On the twenty-sixth of September, 1823, a compromise takes place, and a receipt is given to Slidell for a note of one thousand two hundred dollars, which has been paid. It was given on the settlement of the claim of the plaintiff, by way of compromise; or, in other words, Delonguemare received one thousand two hundred dollars as the full amount of the plaintiff's claim. It will be remembered that at this time the plaintiff's demand must have been against the partners jointly, for there had been no individual assumption of the debt. The receipt shows the inducement that Slidell had for making this arrangement. Slidell was to be substituted in the place of the plaintiff, and receive to his own use whatever could be collected of the debt, and accordingly, on the eighth of December, 1823, he was substituted by a power of attorney from Delonguemare, and by virtue of that power, on the twenty-ninth of October, 1825, he received a dividend of one thousand four hundred and forty-nine dollars and ninety cents, and now seeks to recover in the name of the plaintiff the moiety which was to have been received on the individual responsibility of the partners. This can not be done. The acceptance of the note, and payment of it, was a good accord and satisfaction. Here the note of third persons, John Slidell & Co., was given, accepted, and paid:

and although it be admitted that it was for a less sum than the debt, was nevertheless a valid discharge. The case of *Boyd & Suydam v. Hitchcock*, 20 Johns. 76 [11 Am. Dec. 247], fully supports this doctrine. The plaintiff, then, has received satisfaction, and discharged his debt. After this it was not competent for him to authorize the partner paying to keep the original demand alive, and enforce it by action in the plaintiff's name against the other partner.

The motion to set aside the verdict is denied.

ACCEPTANCE OF PART OF DEBT AS SATISFACTION.—An agreement to pay a less sum than is owing is not a good accord: *Seymour v. Minturn*, 8 Am. Dec. 380. But the acceptance of the note of a third person for a part of the debt as satisfaction, extinguishes the original debt: *Boyd v. Hitchcock*, 11 Am. Dec. 247. To the same effect are *Frisbie v. Larned*, 21 Wend. 453; *Conkling v. King*, 10 Barb. 375; *Keeler v. Salisbury*, 27 Id. 488; *Bunge v. Koop*, 5 Rob. 12; and *Webb v. Goldsmith*, 2 Duer, 418, all citing the principal case. So, too, the acceptance of the debtor's own note for part indorsed by third parties: *Dolsen v. Arnold*, 10 How. Pr. 529. And generally, additional security for part of a debt, or any benefit or legal possibility of benefit to the creditor, is a good consideration for a compromise and a release of the remainder of the debt: *Booth v. Smith*, 3 Wend. 68; *Kellogg v. Richards*, 14 Id. 119; *Phillips v. Berger*, 2 Barb. 612; *Nevins v. Depierres*, 1 Edm. 199, citing *Le Page v. McCrea*. But a receipt in full to one joint debtor, on payment of his half of the debt, is no release of the other: *Buckingham v. Oliver*, 3 E. D. Smith, 131.

MERGER, THE DOCTRINE OF, is discussed at length in the note to *Speed's Ex'rs v. Haan*, 15 Am. Dec. 81.

WELSH v. CARTER.

[1 WENDELL, 185.]

ACTION FOR SELLING ONE ARTICLE FOR ANOTHER will not lie, except where there is fraud or a warranty.

SALE OF A SPURIOUS AND WORTHLESS ARTICLE, fraudulently made to resemble a valuable commodity for which it is sold, will not authorize an action by the vendee against his vendor, who is ignorant of the fraud, and has given no warranty.

RULE OF CAVEAT EMPTOR requires that the vendee shall guard against latent defects, by demanding a warranty, or bear the loss himself.

THE FACT THAT THE VENDOR HAS A REMEDY OVER against the person from whom or through whom he obtained an article, does not make him liable to his vendee for defects therein, in the absence of fraud or warranty.

DECLARATIONS OF AGENT AS EVIDENCE.—In an action against a vendor for the sale of a spurious article of merchandise, declarations of the agent who effected the sale, made subsequently to other purchasers of portions of the same lot of merchandise, are competent evidence.

ASSUMPT on a promissory note. Plea, the general issue, with notice that the defendant would rely upon certain special matters of defense to be proved at the trial. The defense was that the note was given for the purchase price of a quantity of barilla bought by the defendant of John Welsh, who imported it, and for whose benefit this action was brought, and that the article sold as barilla was not barilla at all, but was a fraudulent imitation of it, and was entirely worthless. It appeared that the article in question was sold to the defendant by one Fitch, the agent of Welsh; that before purchasing, the defendant had a sample of the article analyzed; that there was no fraudulent representation or warranty on the part of the vendor's agent, but that he told the defendant that he must judge for himself; and that the barilla was subsequently analyzed, and found to be a fraudulent imitation of the genuine article, and was wholly valueless. There was no evidence that either the vendor or his agent knew that the article was spurious. Some declarations and representations made by the agent subsequent to the sale, with respect to the value of the barilla remaining on hand, were offered in evidence by the defendant, as tending to show fraud, and were admitted, against the plaintiff's objection, and the plaintiff excepted. The judge left the questions of fraud and warranty to the jury, and instructed them that if they believed the article to be a fraudulent one, although they should find that there was no fraud in the vendor, the policy of the law cast the loss on him as the importer of the article, to which the plaintiff excepted. Verdict for the defendant. The case was heard here on the exceptions taken at the trial.

J. Coit and D. B. Ogden, for the plaintiff, argued that the vendor was not liable for selling a spurious article unless knowledge of the fraud was brought home to him, or unless there was a warranty, particularly where, as in this case, the vendee had an opportunity to examine, and did examine, the commodity for himself: *Swett v. Colgate*, 20 Johns. 196 [11 Am. Dec. 266]; 4 Cow. 440; 3 Camp. N. P. 153; 4 Id. 144, 169; 2 East, 320.

Anthon, for the defendant, contended that this case was distinguishable from those relied on by the plaintiff, because here the article delivered was totally different from that agreed to be sold, and that the vendee, having been imposed upon by a sale of one thing for another, though there was no deceit in the

vendor, ought to have his remedy against the latter, who in his turn had his remedy over against his foreign factor: *Horn v. Nichols*, 1 Salk. 289; Bull. N. P. 31; Esp. N. P. 629; Long on Sales, 235; Livermore, 39; Paley's Agency, 230; Ross' Vendors, 128; 1 Moore, 108. He also contended that the declarations of Fitch were properly admitted: 4 Stark. 60; 6 Cow. 90; 3 Johns. 235; 2 Campb. 555.

By Court, SUTHERLAND, J. The judge charged the jury, "that if they believed the article sold by the plaintiff to the defendant to be a fraudulent article, although they should find that there was no fraud in the vendor, yet the policy of the law cast the loss upon him as the importer of the article." In *Jewitt v. Colgate and others*, 20 Johns. 196,¹ the article sold, as in this case, was sold as barilla, but it proved to be not barilla, but kelp, an entirely different article, not used in this country, of little value for any purpose, and of none whatever for the purpose for which barilla is used: the manufacture of soap. It was contended in that case that the commodity having been advertised and sold as and for barilla, and so described in the bill of parcels accompanying the delivery of it to the defendants, it amounted to an undertaking of warranty, on the part of the vendor, that it was barilla; that a warranty is always implied that the article is that for which it is sold; but the court held that no such distinction was to be found in the cases; that the common law rule, *caveat emptor*, applied to the case, and that where there is no fraud or agreement to the contrary, if the article turns out not to be that which was supposed, the purchaser sustains the loss.

The same doctrine had been previously held in this court, in *Seizus v. Woods*, 2 Cai. 48 [2 Am. Dec. 215]. The action there was for selling peachum for brazilletto wood, and as there was neither warranty nor fraud, the vendee was held to have purchased at his peril. All the authorities are considered and analyzed in these cases, and the doctrine is conclusively established, that to maintain an action for selling one article for another, there must be either warranty or fraud. The rule of the civil law is admitted to be different. Can the circumstances, then, that the article sold is an entirely spurious and worthless one, fraudulently made for the express purpose of being sold for a valuable commodity which it was made to resemble, vary the rules of law as between innocent vendors and vendees?

The principle of the rule of *caveat emptor* is this, that the

1. *Jewitt v. Colgate*, 20 Johns. 196 [11 Am. Dec. 266].

vendee has it in his power to guard against any latent defect or deception in the article purchased, by exacting a warranty from the vendor; but if, instead of taking this precaution, he will trust to his own sagacity and judgment, he should bear the loss if they deceived him. The principle assumes that both parties are equally innocent, and it throws the loss upon him who omits to exact that which would have afforded him ample protection, the exacting of which would have apprised the opposite party of the necessity of taking measures for his own indemnity. The principle does not look beyond the immediate parties to the transaction, and why is it not as applicable to a case where the article was originally a fraudulent one, as the judge expresses it in his charge, as to any other, if the vendor was not affected with the fraud? It is said the policy of the law in such cases casts the loss upon the importer or vendor, because he has his remedy over against his factor beyond the sea; whereas the defendant has no remedy, if the loss is thrown on him. Suppose, in an ordinary case, it should appear that the vendor who sold an article without warranty, purchased it with warranty, would that circumstance change the rule of law as between him and his vendee, and render him liable to respond; not because he had been guilty of fraud, or had agreed to be answerable under such circumstances, but because, if he was made responsible, he would be able to receive back whatever he was compelled to pay?

The law does not proceed upon such principles. It does not determine the rights of A. against B. by inquiring into those of B. against C. I am not aware of any consideration of public policy which should induce the adoption of such a rule. The declarations or representations of Fitch, in relation to this same lot of barilla, to other persons to whom he offered parcels of it for sale, subsequent to the sale to the defendant, I am inclined to think were properly admitted. Fitch was the agent for the plaintiff, for the purpose of selling the whole lot of barilla, and his agency continued until that was accomplished or his power was withdrawn. His subsequent representations might, in connection with other circumstances, in the absence of any direct proof as to what his contract with the defendant was, be entitled to some weight, though under the circumstances of this case, where we have the direct and positive testimony of Fitch upon the subject, I think they should have had but little influence with the jury. They were, however, admissible, and the excep-

tion upon that point was not well taken. On the first point, however, we are of opinion that the learned judge erred.

A new trial must, therefore, be granted.

WARRANTIES ON SALES OF CHATTELS.—On the subject of implied warranties on sales of chattels, and the application of the rule of *caveat emptor*, see *Bailey v. Nickols*, 1 Am. Dec. 83, and note; *Timrod v. Shoolbred*, Id. 620; *Whitefield v. McLeod*, Id. 650; *Seixas v. Woods*, 2 Id. 215, and note; *Vanderhoof v. McTaggart*, Id. 667; *Lanier v. Auld*, 3 Id. 680; *Johnston v. Cope*, 5 Id. 423; *Emerson v. Brigham*, 6 Id. 114, and note; *Van Bracklin v. Fonda*, 7 Id. 339; *Westmoreland v. Dixon*, 9 Id. 763; *Erwin v. Maxwell*, Id. 602; *Dean v. Mason*, 10 Id. 162; *Smith v. McCall*, Id. 666, and note; *Swett v. Colgate*, 11 Id. 266, and note; *Allisons v. Noble*, 13 Id. 230; *Hanks v. McKee*, Id. 265; *Hastings v. Lovering*, Id. 420; *Hughes v. Robertson*, 15 Id. 104. As to warranties on sales by sample, see the note to *Bradford v. Manly*, 7 Am. Dec. 125. The principal case is often referred to as an authority for the general doctrine that where there is no fraud or warranty, the vendor of a chattel is not liable for a defect of quality, but the rule of *caveat emptor* applies: *Waring v. Mason*, 18 Wend. 444; *Gillespie v. Torrance*, 25 N. Y. 308; *Beirne v. Dord*, 5 Id. 98; *Carley v. Wilkins*, 6 Barb. 564; *Wilbur v. Cartwright*, 44 Id. 540. So where an article has been fraudulently made to resemble another, if the vendor is no party to the fraud, and has no notice of it: *Hart v. Wright*, 17 Wend. 269.

PEOPLE v. FITCH.

[1 WENDELL, 198.]

FRAUDULENT ALTERATION OF SATISFIED ORDER BY DRAWER NOT FORGERY.—

An alteration of the date of an order for the delivery of goods, made by the drawer with fraudulent intent, after the order has been satisfied and returned to him, is not forgery.

ACTUAL PERPETRATION OF A FRAUD is not necessary to constitute forgery.

An intent to defraud is enough, if the act tends to effectuate the fraud.

INDICTMENT for forgery, tried at the Genesee oyer and terminer. The indictment contained two counts, the first charging the defendant with the forgery of a certain order previously drawn by himself, the second charging him with uttering and publishing the order as true, with intent to defraud one Bangs. It appeared that the order in question was drawn by the defendant November 4, 1823, on a settlement of accounts between himself and one Bangs, and that it directed Kellogg, the drawee, to deliver a certain cow to Bangs, and that the defendant at the same time gave a note to Bangs for the balance between them; that the order was presented, and the cow delivered to Bangs, and that the defendant afterwards took up the order in settling with Kellogg; that Bangs afterwards sued the defendant on the note mentioned above; that the defendant set

off the order referred to, when it appeared that the date had been altered from November 4 to November 14, and on an opinion being expressed to that effect, the defendant withdrew the order, and the suit was discontinued; that the defendant afterwards sued Bangs for the price of the cow delivered by Kellogg when Bangs set off the note; and, on the trial, the delivery of the cow being proved, the order, however, not being produced, the present defendant obtained judgment for the balance of the price of the cow after deducting the amount of the note. The judge charged the jury that the order being *functus officio*, the subsequent alteration of it was not forgery under the statute, but that they might find the defendant guilty at the common law, if they thought the alteration proved. The jury found the defendant guilty under the first count, but not guilty under the second; whereupon judgment was suspended until the advice of this court could be taken.

L. Rumsey, district attorney, cited 2 East, P. C. 852, 855, 979; 3 Chit. C. L. 199, 780, 799; 5 Johns. 236; Archb. 189, 192; East, C. L. 854, 855; McNally's Ev. 439; 1 Chit. C. L. 238.

H. J. Redfield, for the defendant, cited 4 Bl. Com. 245; East, C. L. 840, 861; 2 Ld. Raym. 1461; *Rex v. Knight*, Salk. 375.

By Court, SAVAGE, C. J. Is this forgery? Forgery has often been defined by learned jurists. By Mr. Justice Blackstone, "forgery is the fraudulent making or alteration of a writing, to the prejudice of another's right;" by Buller, justice, "the making of a false instrument with intent to deceive;" by Baron Eyre, "a false signature with intent to deceive." Again: "the false making an instrument which purports, on the face of it, to be good and valid for the purposes for which it was created, with a design to defraud;" by Grose, justice, "the false making of a note or other instrument with intent to defraud;" by Mr. East, "the false making of any written instrument for the purpose of fraud and deceit;" 2 East's P. C. 852, 853; by Mr. Chitty, "the false making or alteration of such writings as either at common law, or by statute, are its objects, with intent to defraud another;" 3 Chitty's Cr. L. 1022. This writer notices a distinction between forgery and fraud; that the latter must actually take effect, while the former is complete, though no one is actually injured if the tendency and intent to defraud be manifest. As to what false making is necessary to constitute the offense, it has been held that a party may make a false deed in

his own name, by antedating, for instance, so as to prejudice a prior grantee. So by indorsing a bill of exchange in his own name when he is not the real payee: 2 East's P. C. 855; 4 T. R. 28. On this principle, we held Peacock guilty of forgery for indorsing the permit for the delivery of a quantity of coal, with his own name, knowing that he was not the real consignee of the coal, though of the same name: 6 Cow. 72. So making a fraudulent alteration or erasure in any material part of a true instrument, or any alteration which gives it a new operation, as by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated: 4 T. R. 320; 3 Chitty's Cr. L. 1038; 2 East's P. C. 855.

As to what shall be considered a warrant or order under the statute, the document forged must be such as appears to give to the bearer a disposing power over the property which he demands; it must assume to transfer the right, at least, of the custody of the goods to the offender: 3 Chitty's Cr. L. 1033.

Such are the principles applicable to cases of forgery of the description of the present. This is not like the case of the bill of exchange, with the date altered after acceptance and before payment. Here the order was paid. Suppose a bill of exchange or promissory note, paid and taken up by the maker, who then, for purposes of fraud, alters the date, would such alteration constitute forgery? Suppose the defendant in this case, instead of prefixing the figure 1 to the figure 4, in the date of the order which had been paid and taken up, had drawn an entire new order of the date of the fourteenth of November, would that have been forgery? Here was no intermeddling with an instrument, the property of another. Here was no use of the name of another. Here was, indeed, a fraudulent intent; but, in the act of altering the date, or drawing a new order of his own, there was no necessary tendency to fraud. The order was not at all necessary to aid in the perpetration of the fraud which the defendant contemplated, and which he effected without the order. The paper, in his own hands, could have no effect, and was no evidence in his defense to the action on the note; and had he produced the witness to prove the delivery of the cow under it, that witness must have falsified the order and defeated the fraud. It is not necessary, however, that fraud should be perpetrated to constitute this offense. An intent is sufficient, with a tendency to effectuate fraud. My objections to this conviction are: 1. That this paper, after it was delivered up to the defendant, was no instrument at all, in the legal acceptance of

the term; 2. There was no false making. The order purported to be drawn by the defendant, and it was so drawn. It purported to be dated the fourteenth of November, and it was so dated; 3. The order had no tendency to aid in the fraud. I am, therefore, of opinion that the court of oyer and terminer be advised to arrest the judgment.

Approved in *People v. Cady*, 6 Hill, 491, and applied to a case where, after notice of execution of a writ of inquiry had been served on an attorney, he altered the figures in such notice, indicating the day appointed for executing the writ, in order to make the notice appear irregular, with intent to defraud, the court holding that the notice was then *functus officio*. Actual perpetration of a fraud is not necessary to support a prosecution for forgery. It is enough if the intent was to defraud, and the party might have been defrauded if the forgery had been successful: *State v. Jones*, 17 Am. Dec. 483.

BISSELL v. GOLD.

[1 WENDELL, 210.]

ARREST ON A VOID WARRANT, WHO LIABLE FOR.—A warrant of arrest issued in a civil action by a justice, without the oath required by statute, is void for want of jurisdiction, and all persons concerned in an arrest thereunder are liable as trespassers.

DISCONTINUANCE OF ACTION BY DELAY IN SERVICE.—Where the statute provides that in an action in a justice's court, commenced by summons, if the summons is not personally served, and the defendant does not appear nor show good cause for not doing so, the justice may issue another summons or warrant, at his option, such subsequent summons or warrant must be issued within a reasonable time, or the action will be discontinued.

REASONABLE TIME IN SUCH A CASE would be the time allowed by law for the return of the original summons.

ARREST, WHAT IS.—Manual touching of the body, or actual force, is not necessary to constitute an arrest and imprisonment; it is sufficient if the party is within the officer's power, and submits to the arrest.

PARTY IN A JUSTICE'S COURT IS NOT LIABLE FOR ISSUING PROCESS or for an arrest thereunder, unless he directs or sanctions it.

ARREST, HOW SANCTIONED.—Attendance at the trial, and proceeding with the action, after knowledge of the arrest, will make the party liable therefor.

DEFENDANT HAVING A JUSTIFICATION AND JOINING IN A PLEA with a co-defendant who can not justify, loses his defense; but the plaintiff must show a cause of action against him on the general issue before he is called on to justify.

ACTION for false imprisonment, tried at the Oneida circuit. Plea, the general issue by the defendants jointly, with notice of special matter. It appeared that in July, 1824, a summons

was issued by a justice in an action by the present defendants, Gold and Sill, against the plaintiff, for the collection of a certain note, which summons was returned served by copy. In July, 1825, the justice issued a warrant against Bissell in the same action. Bissell was informed by the officer that he had the warrant, he went along with him for some distance, until he procured a person to be surety for his appearance the next day. He appeared accordingly, and Gold, one of the defendants here, being notified, one of his clerks attended the trial by his direction. Bissell objected to the arrest on the ground that being a freeholder, and having a family in the county, no warrant could issue against him without the oath required by statute, and that the service by copy in 1824 did not authorize the issuance of a warrant in 1825. The objection was overruled and judgment given for the plaintiffs in that action, defendants here. It appeared, also, that the plaintiff here was a freeholder, and that the warrant was issued without any oath. It did not affirmatively appear that either Gold or Sill gave the justice explicit instructions to issue the warrant. The judge instructed the jury that the warrant was void, and the imprisonment proved; and that the appearance of Gold made him liable for the trespass, but left it to the jury to say whether Sill was guilty or not. Verdict for the plaintiff against both defendants; and motion for a new trial on grounds appearing in the opinion.

S. A. Talcott, attorney-general, for the defendants, claimed: 1. That the warrant was regularly issued; 2. That an actual arrest must be proved, which had not been done; 3 Bos. & P. 211; 3 Camp. 139; 1 Salk. 79; 3. That if the issuance of the warrant was irregular, the justice was liable, and not the defendants, unless it clearly appeared, as it did not, that they either directed its issuance or explicitly assented to it afterwards: 2 Johns. Cas. 49, 51; 3 Id. 84, 85; 7 Cow. 249; 9 Johns. 117; and that even if Gold had assented, it did not bind Sill.

J. A. Spencer, for the plaintiff, contended: 1. That the issuance of the warrant was irregular, because the proceedings had not been strictly followed up whereby the suit was discontinued: 5 Johns. 353; 20 Id. 309; 2. That a manual touching was not necessary to an arrest; 3. That the contrary not appearing, it would be presumed that the warrant issued upon the application of the plaintiffs in the action; 4. That the defendants having joined in their plea, if either had a justification he had

lost it: 2 Oai. 108; 7 Cow. 330; 5. As to the right to maintain the action, he cited, 11 Johns. 444; 12 Id. 257; 3 Cow. 206 [*Adkins v. Brewer*, 15 Am. Dec. 264].

By Court, SAVAGE, C. J. A motion was made for a new trial on several grounds. 1. It is contended that the warrant was regularly issued; that the justice having once issued a summons, and that being returned, served by copy, he may issue a warrant as a continuance of that suit, at any time during the continuance of his commission. The statute directs that the first process against freeholders and inhabitants having families shall be by summons; "but if such summons was not served personally, and the defendant does not appear at the time and place appointed in such summons, nor show good cause for not appearing, then the said justice shall issue another summons or warrant against such defendant at his option:" Statutes, vol. 6, c. 281. In all other cases, a warrant against a freeholder or inhabitant having a family, must be granted upon oath according to the act, except in favor of a non-resident plaintiff.

In cases where summons is the regular process, a warrant without oath is irregular and void. Without the oath, the justice has no jurisdiction over the person of the defendant; and all parties concerned in an arrest under such process are trespassers. If the warrant in this case was issued as the first process in the cause, no doubt it must be held irregular and void; but it is supposed to be justified by the statute, in consequence of the previous issuing and service by copy of the summons. Had the summons been personally served, the plaintiff must, upon the return of it, have taken some further proceeding in the cause, or the cause would have been discontinued; but if the ground assumed by the defendants be correct, after a service of a summons by copy the plaintiffs may omit any further proceeding for twelve months or twelve years, if the justice should remain in commission, and yet the suit continue.

The legislature, I apprehend, never intended to make such a law; nor have they. It is not stated within what time the plaintiff shall be at liberty to proceed by warrant, after the return of a summons served by copy. It may be done, no doubt, as soon as a reasonable time for the defendant's appearance has expired without an appearance. How long this privilege continues we can only infer from the policy of the act and the general course of proceedings before justices.

The defendant is not compelled to appear, though he may do so, upon a service of a summons by copy. If he does not,

the plaintiff can compel his appearance by another summons, or be in a situation to take judgment upon personal service. But the legislature seem to have thought that if the defendant did not choose to appear upon service by copy, the plaintiff ought not to be delayed for twelve days longer, before he could make any progress in the suit, and therefore authorized the issuing a warrant instanter. But if the plaintiff chooses to delay issuing a warrant for twelve days after the return of service by copy, I can see no reason arising out of the statute why he should not proceed again by summons and the suit be considered a new suit.

It is somewhat singular that there is no reported case deciding how long the privilege of issuing a warrant continues. The practice, I presume, has been to issue the warrant on the day of the return of the summons. In the case of *Van Rensselaer v. Granger*, decided several terms past, a warrant had been issued on the day when the summons was returned, served by copy, and after the defendant had neglected to appear; and one question was, whether the issuing the summons or the warrant was the commencement of the suit; we held there was but one suit, commenced by the summons and continued by the warrant.

In the case of *Babcock v. Ely*, decided May term, 1825, the question now before the court was considered, and in my judgment decided. In that case, Ely had sued Babcock by summons before a justice. The summons was regularly issued, and on the twenty-third of November, 1821, returned served by copy. On the return, no demand being made for a summons or warrant, the justice, without the knowledge of the plaintiff, supposing the suit at an end, entered under the title of the cause that the plaintiff appeared, but the defendant did not; and that the plaintiff was indebted for costs, and charged him twelve and one half cents for judgment, and subscribed his name thereto, which was his custom when a suit was disposed of. On the second of February, 1822, the justice issued a warrant in the same cause, without oath, the defendant being an inhabitant having a family. Babcock sued Ely for false imprisonment, for the arrest upon this warrant, in Monroe common pleas. On the trial in that court, the plaintiff was nonsuited; but on error brought to this court, we reversed the judgment of nonsuit, holding that the plaintiff before the justice, by his delay, was out of court, and could not legally proceed by warrant without oath. In that case the plaintiff had neglected to proceed for more than two months. Here twelve months exactly

elapsed between the issuing of the summons and the warrant. In the former case the justice made an entry, showing his understanding that the suit was at an end. No such entry was made in this case. But holding, as I do, that the plaintiff before the justice is bound to make his election in a reasonable time, and that no reason can be drawn from the statute for extending that reasonable time beyond twelve days, I do not consider the entry of the justice as material. On this point, therefore, I am of opinion that the issuing of the warrant was irregular and illegal.

2. It is said there was no arrest; and some cases are cited to show that submission to process without compulsion is no arrest nor imprisonment. Yet we understand the law to be well settled, that no manual touching the body, or actual force is necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer, and submits to the arrest. Such was the fact in this case.

3. The only remaining question is, whether these defendants are liable for the illegal arrest and detention of the plaintiff. The justice issued the warrant; but whether the plaintiffs in that suit, or either of them, gave explicit orders, he does not recollect. He leaves us to infer that he issued the warrant without orders. In *Percival v. Jones*, 2 Johns. Ch. 51, this court said: "While the justice acts ministerially, or as clerk of the party, he will be justified in issuing any process within his jurisdiction that may be demanded by the plaintiff. But in order to charge the plaintiff in the suit, it should appear that it was really his act. It ought not to depend on the general intentment of the law, that every writ or process is purchased by the party in whose favor it issues. If it appears to be the officious or voluntary act of the justice, without any direct authority for that purpose, an innocent plaintiff ought not to be implicated. So, also, in *Taylor v. Trask*, 7 Cow. 249, it was held that a party in a justice's court is not accountable for the issuing of process, unless he directs or sanctions it; and a different relation was supposed to exist between the party and the justice, from that of client and attorney in courts of record.

4. It becomes necessary, then, to inquire, whether the plaintiffs before the justice, the defendants here, sanctioned the conduct of the justice in issuing the warrant. Mr. Gold undoubtedly did. When he was notified by the constable, he sent his clerk to attend the trial. The objection was expressly taken on the trial, and opposed by Mr. Gold's agent. But there is no

evidence showing any direction by Mr. Sill, nor any approbation subsequently. The verdict against him, therefore, seems to be without evidence. It is urged, however, on the part of the plaintiff, that having pleaded jointly with Mr. Gold, he must share the same fate. There are cases where one defendant, by joining in a plea with a co-defendant, loses the benefit of a defense good as to him if pleaded separately; but those are cases of justification, either under a special plea, or where a justification may be given in evidence under the general issue. This is not a case where a justification can be proved unless pleaded or given notice of. So far as his defense consisted of a justification, Mr. Sill must abide the fate of Mr. Gold; but before it is necessary for him to justify, the plaintiff must show a cause of action upon the plea of the general issue. And it is well settled that though several defendants plead jointly, one may be convicted and another acquitted: 14 Johns. 166.

I am, therefore, of opinion that a new trial must be granted on payment of costs, unless the plaintiff consents to amend the verdict by entering a verdict in favor of Mr. Sill.

ARREST, WHAT IS.—"Arrest (*arrestum*)," says Jacob, in his law dictionary, "cometh of the French word *arrester*, to stop or stay. It is a restraint of a man's person, obliging him to be obedient to the law; and is defined to be the execution of a command of some court of record, or officer of justice." Mr. Abbott more briefly defines an arrest to be "the act of taking a person into custody of the law." Abbott's Law Dict. Baldwin, J., in his charge to the jury, in *United States v. Benner*, 1 Bald. 239, said: "An arrest is the taking, seizing, or detaining the person of another; touching, or putting hands upon him, in the execution of process, or any act indicating an intention to arrest." To constitute an arrest, in the strict sense of the word, three things seem to be necessary.

1. There must be some real or pretended legal authority for taking the party into custody. A forcible seizure of one's person, therefore, without any pretense of taking him into legal custody, would not, properly speaking, be an arrest. In a more extended sense, however, the term "arrest" would include such a seizure, since it would be the beginning of an unlawful imprisonment for which an action would lie. Thus it has been held to be an imprisonment for the officers of a bank to lock the door upon a visitor who remained within the bank after the hour of closing, thus restraining him of his liberty: *Woodward v. Washburn*, 3 Denio, 369. So when the defendant stopped the prosecuting witness in the road and compelled him, by threats of violence and by exhibiting weapons, to give up a paper in his possession, before allowing him to proceed on his way, it was held that an action for assault and false imprisonment would lie: *Bloomer v. State*, 3 Sneed, 66. So where a party was called out of his house, and detained at his own gate for fifteen minutes and compelled, by threats of bodily harm, to confess that he had been guilty of falsehood, and to take a drink with his assailants: *Herring v. State*, 3 Tex. Ap. 108. So where a ferryman compelled a traveler to pay his ferriage, by threatening to carry him back over the stream which he

had just crossed: *Smith v. State*, 7 Humph. 43. In each of these cases, and in others which might be cited, there was no technical arrest, because there was no pretense of legal process or other lawful authority for the detention and restraint, and yet there was undoubted imprisonment.

2. There must also be "a restraint of the person, a restriction of the right of locomotion," or there will be no arrest: *Hart v. Flynn*, 8 Dana, 190. The party must be taken into custody and restrained of his liberty: *French v. Bancroft*, 1 Met. 502. Hence an arrest is not to be implied from the mere personal service of a notice or summons, by which no bail is required, and which occasions no restraint of personal liberty: *Hart v. Flynn*, 8 Dana, 190. So, even the personal service of a writ of *capias ad respondendum*, by delivering a copy thereof to the defendant, does not constitute an arrest, but is no more than a mere citation or notice to appear: *Huntington v. Shultz*, Harper's Law Rep. (S. C.) 452; S. C., 18 Am. Dec. 660.

3. The act relied upon as an arrest must have been performed with the intent to effect an arrest, and must have been so understood by the party arrested. Therefore, although an actual arrest may be effected by laying hands on the person arrested, or by a mere touch, it will not be so unless so intended. Thus, when an officer, having a warrant against a person, shakes hands with him, or informs him that he has a warrant for him, at the same time tapping him on the shoulder, without telling him that he arrests him, it is for the jury to say, from all the circumstances, whether the act was intended to be an arrest, and unless they find that it was, there is no arrest: *Jones v. Jones*, 13 Ired. L. (N. C.) 443. And it must be so understood by the party. There can be no arrest where the person arrested is not conscious of any restraint of his liberty. Thus, where a pupil was detained at school until his parent would pay his tuition, but the pupil himself was not aware of the fact, but supposed his detention to be only such as was usual in the government of the school, it was held that there was no imprisonment: *Herring v. Boyle*, 1 Crompt. M. & R. 377.

NECESSITY OF AN ACTUAL MANUAL CAPTION.—The question as to whether or not an actual physical caption or manual touching of the body of the prisoner is necessary to effect an arrest, depends upon the further question, whether or not the arrest is submitted to. If the party resists the arrest, or endeavors to evade it, there must be an actual touching of his person, or some physical restraint of his liberty to depart, in order to complete the arrest: Sewell's Law of Sheriff, 129; Allen on Sheriffs, 96; Atkinson's Sheriff Law, 178. Mere words will not do in such a case. Thus, where an officer came with a warrant, and when at some distance from the defendant, told him that he arrested him, but the defendant kept the officer off with a fork which he had in his hand, and retreated into his house, it was held that there was no arrest, and that the defendant was not liable to an attachment for contempt: *Genner v. Sparkes*, 1 Salk. 79. So, where an officer with a warrant went to a tavern where the intended prisoner was sitting, and said: "Hamer, I want you," to which the latter replied, "Wait for me outside the door, and I will come to you," and then left the room, and did not return, it was held that there was no arrest, and no escape, although there would have been, if the party had gone with the officer even into the passage: *Russen v. Lucas*, 1 Car. & P. 153. But if an officer having authority to make an arrest lays his hand upon the person of the prisoner, however slightly, with the intention of taking him into custody, it is an arrest, although he may not succeed in stopping or holding him even for an instant: *Whithead v. Keyes*, 3 Allen, 495. So, even though the officer does not touch his prisoner,

but merely locks the door of the room in which he is, and tells him he arrests him, it is enough: *Williams v. Jones*, Cas. t. Hard. 298. So, it is an imprisonment, as already stated, where the door of a bank is locked upon a visitor whereby he is prevented from leaving when he pleases: *Woodward v. Washburn*, 3 Denio, 369. But where a visitor on board a ship has reasonable warning and opportunity to leave the vessel before she sails, but neglects to do so, and is carried out to sea, there is no imprisonment: *Spoor v. Spooner*, 12 Met. 281.

IF, HOWEVER, THE PARTY SUBMITS TO THE ARREST, and is within the power of the officer or other person effecting the arrest, it is sufficient without any actual taking or manual touching of the person: 1 Hilliard on Torts, 210; Cooley on Torts, 169; Gwynne on Sheriffs, 95, 96; Allen on Sheriffs, 96; Sewell's Law of Sheriff, 129; Atkinson's Sheriff Law, 178; *Homer v. Battyn*, Bull. N. P. 62; *Grainger v. Hill*, 4 Bing. N. C. 212; 33 Eng. Com. L. (5 Scott), 561; *Warner v. Riddiford*, 4 Com. Bench, N. S. 205; *Murphy v. Countess*, 1 Harr. (Del.) 143; *Johnson v. Tompkins*, 1 Bald. 571; *Bloomer v. State*, 3 Sneed, 66; *Smith v. State*, 7 Humph. 43; *Pike v. Hanson*, 9 N. H. 491; *Emery v. Chesley*, 18 Id. 198; *Field v. Ireland*, 21 Ala. 240; *Floyd v. State*, 12 Ark. 43; *Courtney v. Dozier*, 20 Ga. 369; *Herring v. State*, 3 Tex. Ap. 108; *Mourry v. Chase*, 100 Mass. 79; *Searls v. Viets*, 2 Thomp. & C. (N. Y.) 224; *Brushaber v. Siegemann*, 22 Mich. 266. "If," says Buller's Nisi Prius, 62, citing *Homer v. Battyn*, "the bailiff who has a process against one, says to him, when he is on horseback or in a coach, 'You are my prisoner; I have a warrant against you;' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process." If the person or persons making the arrest have the present ability to take the prisoner, and the latter goes with his captor, not voluntarily and of his own accord, but yielding to superior force, it is an arrest; as where a mob of persons, having the power to compel obedience, insist that a party whom they charge with crime shall go before a magistrate, and he goes, though against his will, without their laying hands on him, the arrest is complete. Such were substantially the facts in *Johnson v. Tompkins*, 1 Bald. 571, where an action was brought for false imprisonment, and Baldwin, J., charging the jury, said: "It is not necessary, to constitute false imprisonment, that the person restrained of his liberty should be touched or actually arrested if he is ordered to do or not to do the thing, to move or not to move against his own free will, if it is not left to his own option to go or stay where he pleases, and force is offered or threatened, and the means of coercion are at hand ready to be used, or there is reasonable ground to apprehend that coercive means will be used if he does not yield. A person so threatened need not wait for its actual application. His submission to the threatened and reasonably to be apprehended force is no consent to the arrest, detention, or restraint of the freedom of his motion; he is as much imprisoned as if his person was touched, or force actually used; the imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease, and the means of effecting it are removed."

So, where two persons went up to another upon the highway, being armed with clubs, and told him that they wanted him to accompany them to a police officer, charging him with having committed a crime, and he went with them accordingly, and afterwards brought an action against them for false imprisonment, the court below charged the jury as follows: "Now, a man may be imprisoned without being taken hold of by the persons that imprison him.

Suppose, for instance, an officer comes to one of you with a warrant, and says: 'I want you to go along with me,' and you go along without his taking hold of you, that would be an arrest. It is not necessary that he should lay his hands upon you. So, if a man comes to you and says, 'If you don't go with me, I shall shoot you,' and if you go with him through fear, although he does not touch you, it would be an imprisonment. And if a man comes to you in any other way and uses words, or accompanies them with such an appearance that would lead you to be in fear of him, or make you comply with his demand, that would be an imprisonment. So, in this case, if the defendants came to this plaintiff and told him they wanted to take him to the station-house, and he complied, seeing the two together with clubs in their hands, and went with them through fear, that would be imprisonment." The supreme court, passing upon this part of the judge's instructions said: "We find no error in this charge. It is the fact of compulsory submission which brings a person into imprisonment; and impending and threatened physical violence, which, to all appearance, can only be avoided by submission, operates as effectually, if submitted to, as if the arrest had been forcibly accomplished without such submission. There are cases in which a party who does not submit can not be regarded as arrested until his person is touched; but when he does submit no such necessity exists. If the plaintiff yielded through fear to the demands of the two defendants armed with clubs, we can not doubt he was imprisoned within the meaning of the law:" *Bruehaber v. Stegemann*, 22 Mich. 266.

Thus it is seen that an arrest may be effected by mere words without any actual use of force if there is present ability to use force if necessary, and the party yields, not willingly, but from prudential considerations. Where, for instance, a party refused to pay a delinquent tax until she was arrested, and the officer then said, "I arrest you," but did not touch her, and she thereupon paid the tax, it was held in an action for false imprisonment, that this amounted to an arrest and imprisonment: *Pike v. Hanson*, 9 N. H. 491. So, where an officer told a party that he had a writ for him, and that he must either find bail or go to jail, and the party refused to get bail, but said that he would go to jail, and then asked and obtained permission to step out of the room for a moment, and did not return, it was held to be an arrest and escape, because the intention to make an arrest, and the power to effect it, co-existed: *Emery v. Chesley*, 18 N. H. 193. So, where an officer meeting certain persons against whom he had a warrant, told them he had a warrant for them, and they submitted to the arrest, and the officer went home with them and staid all night, leaving them unguarded to attend to their domestic affairs, and went with them before the magistrate the next day, it was held a sufficient arrest: *Courtroy v. Dozier*, 20 Ga. 369. So, in *Searls v. Viets*, 2 Thomp. & C. (N. Y.) 224, where an action was brought for false imprisonment, it was held that there was a sufficient arrest upon the following state of facts: One Rice, a constable, had a warrant for the plaintiff and his two sons, and, as they were passing his house in their wagon, he came out and said: "I have a warrant for you and your two sons." The plaintiff asked him: "For what?" To which he replied: "For stealing pumpkins." The plaintiff thereupon put his foot on the wheel to get off the wagon, when the constable said: "You can go home and get your horses put up and take your tea and come down." The plaintiff went home accordingly, took tea, employed a lawyer, and with him and his two sons went down to the constable's. Arriving at the house, the plaintiff called out the constable, and said: "Rice, here's your prisoners." The constable went back into the house, saying: "You move on, and I will overtake you." They moved on slowly, and when they got to the corner

where the defendant, the justice who issued the warrant, lived, the constable overtook them, and they went in together. The matter was adjourned until another day, when a hearing was had and the prisoners were discharged. In *Warner v. Riddiford*, 4 Com. Bench (N. S.), 150, it was held a sufficient arrest and imprisonment where the officer refused to allow the plaintiff to leave the room except in company of a bailiff, although he did not touch him or lock the door upon him.

So, in the cases before cited of imprisonment without any pretense of legal authority, a constructive confinement has been held sufficient. Thus, where the plaintiff was called out and detained at his gate fifteen minutes, and compelled to drink with the defendants, by threats and the exhibition of weapons, it was held an imprisonment: *Herring v. State*, 3 Tex. Ap. 108. So, where one was compelled to pay ferriage by the threat of the ferryman to put him and his horse back on the boat and return him to the other side of the river, the court remarked that there was a sufficient imprisonment, because the opposition to the party's leaving was such as a prudent man would not risk: *Smith v. State*, 7 Humph. 43. So, where a party was compelled to dismount upon the highway and give up a marriage license in his possession, by the defendant's drawing an open knife and threatening to cut his throat if he did not submit to the demand: *Bloomer v. State*, 3 Sneed, 66. So, it was held in *Floyd v. State*, 12 Ark. 43, that detaining one in a public street, against his will, would be an imprisonment.

There are several cases, however, which are not in entire harmony with the principles here laid down upon the subject of constructive arrests and imprisonments. Thus, in *Arrowmuth v. Le Mesurier*, 2 Bos. & P. N. R. 211, a constable went to the plaintiff's house with a warrant against him and showed him the warrant. After some conversation, the plaintiff asked for a copy of the warrant, which the officer permitted him to take. He then went with the officer before a magistrate. The officer did not lay hands upon him at any time. Having been discharged, upon an examination before the magistrate, within six hours after the warrant was shown him, the plaintiff brought his action for assault and false imprisonment. After a verdict for the defendant, Lord Mansfield discharged a rule for a new trial, and in doing so, said: "I can suppose that an arrest may take place without an actual touch, as if a man be locked up in a room; but here the plaintiff went voluntarily before a magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested?" Willes, J., in *Warner v. Riddiford*, 4 Com. Bench, N. S. 205, expressed his dissent from the doctrine of that case, and thought that the law was more accurately stated in *Grainger v. Hill*, 4 Bing. N. C. 212; S. C., 33 Eng. Com. L. (5 Scott) 561, where the plaintiff having mortgaged his vessel to the defendants, the latter insisted on his giving up the ship's register, which he refused to do. They then sued out a *capias* against him. When the officer went with the writ the plaintiff was ill in bed; and the officer told him that unless he delivered up the register or found bail, he must either take him or leave a man with him. The plaintiff then, being much alarmed, gave up the register; and it was held that this was a sufficient arrest, although the officers told him when they first came that they did not come to take him, but to get the register.

In *Lawson v. Buzine*, 3 Harr. (Del.) 416, the court seem to have held the opinion that in every case an actual physical caption was necessary to constitute an arrest. That was an action of trespass for a false imprisonment, and it appeared that the officer gave the plaintiff the warrant to read, but did not

touch him; that the plaintiff considered himself under arrest, and tried to get security for his appearance; that failing in this, he asked the officer to allow him to go home and get his coat; that the officer consented, after some hesitation; that the plaintiff went and got his coat, and returned to the officer, who was waiting for him, and went with him. This, the court held, was not an arrest. Harrington, J., delivering the opinion, said: "To constitute a legal arrest, the officer must lay his hand on the defendant, or otherwise take possession of his person. He must make him his prisoner in an unequivocal form." This opinion, however, when considered with a view to the facts of the case, is clearly contrary to the overwhelming weight of authority, and is at variance, apparently, with the former opinion of the same court in *Murphy v. Countiss*, 1 Har. (Del.) 143, where it was laid down that an arrest did not necessarily include a battery.

But the mere submission of a party certainly will not constitute an arrest, if he is not at the time within the power of the officer. Thus, where an officer having a warrant against a party sent him a message asking him to fix a time, and call and give bail, which he did, it was held to be no arrest, although it might have been otherwise if the officer had delivered the warrant to the servant who carried his message to the party to be arrested: *Berry v. Adamson*, 6 Barn. & Cress. 528. Much less will a mere pretended submission constitute an arrest where the party is not within the officer's power, as was the case in *Russen v. Lucas*, 1 Car. & P. 153, referred to in another part of this note, where the person to be arrested told the officer to wait for him outside the door and he would come to him, and then left the room and did not return.

WRONGFUL ARREST, WHO LIABLE FOR.—It is difficult, if not impossible, to lay down a general rule by which to determine who may be liable for a wrongful arrest, owing to the different relations which the persons concerned in such an arrest may have to the transaction. The persons who may be held liable, in such a case, may be the judge or magistrate who issued the warrant; the officer or person who made the arrest, and those who assisted him; the party who procured the arrest to be made, and the attorney of such party; and the liability of each of these persons depends upon different principles.

LIABILITY OF THE MAGISTRATE ISSUING THE WARRANT.—The subject of the personal liability of judicial officers for acts done in their official capacity is very fully discussed in the note to *Yates v. Lansing*, 6 Am. Dec. 303, and is further illustrated in *Grumon v. Raymond*, 6 Id. 200; *Little v. Moore*, 7 Id. 574; *Gregory v. Brown*, Id. 731; *Jones v. Hughes*, 9 Id. 364; *Tracy v. Williams*, 10 Id. 102; *Reid v. Hood*, Id. 582; *Flack v. Harrington*, 12 Id. 170; and *Adkins v. Brewer*, 15 Id. 264. The principles established by these cases are: 1. That a judge of a court of superior or general jurisdiction is not personally liable, even though he exceeds his jurisdiction, unless he acts maliciously or corruptly: See the cases cited in the note to *Yates v. Lansing*, 6 Am. Dec. 303; 2. That a justice of the peace, or other magistrate of inferior or limited jurisdiction, is not liable for errors of judgment or mistakes of law while acting within his jurisdiction, unless he acts from impure or corrupt motives: *Little v. Moore*, 7 Am. Dec. 574; *Gregory v. Brown*, Id. 731; *Jones v. Hughes*, 9 Id. 364; *Reid v. Hood*, 10 Id. 582; 3. That a justice of the peace or other inferior magistrate is personally liable if he acts without his jurisdiction, and another person is injured by the act: *Adkins v. Brewer*, 15 Am. Dec. 264. Therefore, where a justice of the peace commits one to prison under the riot act without a previous complaint in writing, he

exceeds his jurisdiction, and is liable in trespass, for such complaint is necessary to give him authority to act in the premises: *Tracy v. Williams*, 10 Am. Dec. 102. So, he is personally liable if he issues a warrant of arrest without a complaint on oath or personal knowledge that a crime has been committed: *Flack v. Harrington*, 12 Am. Dec. 170. So, where he issues a warrant for the arrest of a person on a prosecution for bastardy, and directs the prisoner to be delivered to the authorities of another state, when the law does not warrant such a proceeding in cases of that nature: *Burlingham v. Wylee*, 2 Root, 152. So, it is held that even where there is a complaint on oath, the justice will be liable for issuing a warrant of arrest if no crime is charged; as where the complainant swore that he was about to pay a party some money, for which it was understood that he was to have a receipt, and while he was counting the money which was lying on the table, the person to whom it was to be paid took it up, contrary to the affiant's express command, and refused to return it, or give a receipt, and the justice thereupon issued a warrant, upon which the person so taking the money was arrested: *Wilson v. Robinson*, 6 How. Pr. 110. So, where a justice issued a warrant, upon which a person was arrested for stealing potatoes, the only evidence to authorize the arrest being the fact that the complainant swore in his complaint or information that his son told him he saw the accused digging the potatoes: *Comfort v. Fulton*, 13 Abb. Pr. 276. These cases all proceed upon the theory that the facts necessary to give the justice jurisdiction are wanting.

It was held, however, in *Rogers v. Mulliner*, 6 Wend. 597, contrary to the dictum contained in the principal case, that a justice was not liable for issuing a warrant against a freeholder without the oath required in such cases if there was nothing to show that he acted *mala fide* or officiously, although the process would be void. The ground of the decision seems to have been that it would be unjust to require the justice to know officially that the party was a freeholder, and that in such cases the justice was really acting ministerially or merely as the clerk of the party demanding the warrant, and that the latter should, alone, be held responsible. Savage, C. J., delivering the opinion of the court in that case, made the following comments on *Bissell v. Gold*: "The case of *Bissell v. Gold*, 1 Wend. 210, was, like this, an action of false imprisonment, founded on an arrest upon a warrant against a freeholder, issued without oath. That, however, was against the party alone, and not the magistrate. In delivering the opinion of the court I stated that 'without the oath the justice has no jurisdiction over the person of the defendant; and all parties concerned in an arrest under such process are trespassers.' So broad a proposition was not called for; as far as it was applicable to the suit then to be decided, it was undoubtedly correct; but as respects ministerial officers it must be subject to qualification. I am inclined to think the true rule is laid down in *Percival v. Jones*, 2 Johns. Cas. 49, that ministerial officers are not responsible for executing any process, regular on its face, so long as the court from which it issues has general jurisdiction to award such process. In that case the court considered a justice, when making out process by the direction of the party, as acting ministerially, or as clerk of the party; and that it was very essential that the justice, when acting in good faith, should be protected; 'for,' the court say, 'it would be intolerable to impose on him the necessity of knowing officially the property or circumstances of every person in the community;' and they, therefore, conclude that process must be issued at the peril of the party demanding it. In that case, however, the justice was held liable, because he acted officiously, and not under the direction of the party."

LIABILITY OF OFFICER EXECUTING THE WARRANT.—If it appears on the face of the warrant that the justice had no jurisdiction to issue it, an officer making an arrest under it is equally liable with the justice who issued it: *Burlingham v. Wylee*, 2 Root, 152. But the officer executing the warrant will be protected, even though the justice had not jurisdiction to issue the warrant, if it appears on the face of the process that he had jurisdiction of the subject-matter and there is nothing to show that he had not jurisdiction also of the person of the party to be arrested: *Savacool v. Boughton*, 5 Wend. 170, citing *Bissell v. Gold*. Regular process, even on a satisfied judgment, is a protection to the officer, but not to the party who wantonly procures it to be issued: *McGuinty v. Herrick*, 5 Wend. 240.

LIABILITY OF THE PARTY PROCURING AN ARREST.—Any person who is present when a wrongful arrest is made, and participates in it, either directly or by causing others to engage in the unlawful act, by "exciting, directing, consenting to, or encouraging" it, is liable therefor: *Johnson v. Tompkins*, 1 Bald. 601. Personally directing an arrest on void process, as, for instance, on a warrant from an inferior magistrate having no jurisdiction, renders a party liable: *Goslin v. Wilcock*, 2 Wils. 302; *Hallock v. Dominy*, 7 Hun (N. Y.) 52. So, even though the affidavit upon which the warrant was procured to be issued was made in good faith: *Painter v. Ives*, 4 Neb. 122. So where the party acts by attorney in suing out the void process: *Parsons v. Loyd*, 3 Wils. 341; *Barker v. Braham*, Id. 368. So where, as in the principal case, a party procures a warrant of arrest to be issued against a freeholder, without making the oath required by statute: *Curry v. Pringle*, 11 Johns. 444. So where a party procures another to be arrested on a writ of *ca. sa.* on a judgment which has been discharged under an insolvent act: *Deyo v. Valkenburgh*, 5 Hill, 242; and a plaintiff has been held liable for an arrest ordered by his attorney, without his knowledge, after implied notice of a discharge under the insolvent act: *Jones v. Nicholls*, 3 Moore & Payne, 12. So where the party causes one to be arrested for a greater sum than is in fact due: *Austin v. Debnam*, 3 Barn. & Cress. 139; S. C., 4 Dowl. & Ry. 653; *Wentworth v. Bullen*, 9 Barn. & Cress. 840. So for procuring an arrest for a less sum than that for which the law authorizes the arrest of a debtor: *Smith v. Cattel*, 2 Wils. 376. And one directing an arrest will be liable, although he may not be present and may be in another state when the arrest is made: *Stoddard v. Bird*, Kirby, 65; *Clifton v. Grayson*, 2 Stew. (Ala.) 412. A party who maliciously causes another to be arrested on a false criminal charge is liable therefor: *Letzler v. Huntington*, 24 La. An. 330. But where the magistrate has jurisdiction of the offense supposed to have been committed, and the complainant states his case in good faith, he is not liable for the subsequent arrest, it seems, even though the facts stated do not warrant the arrest: *Van Latham v. Libby*, 38 Barb. 339; S. C., 17 Abb. Pr. 237. But where a party does not assent to an arrest, he is not liable therefor. Thus, where an execution was issued upon the application of a party, and by a mistake of the magistrate in using an old blank, a provision was inserted in the writ for the arrest of the defendant, the case not being such as to warrant an arrest, and the arrest was made accordingly, but the plaintiff in the writ had no knowledge of it and directed the prisoner to be discharged as soon as he heard of it, he was held not to be liable: *Taylor v. Trask*, 7 Cow. 249. There must be positive and active consent to an arrest and imprisonment to render a party liable therefor, where the arrest is caused by his partner in business for an alleged larceny committed against the firm; and the fact that he knew of the proposed arrest, and did not protest against it, does not, it

seems, make him responsible to the person arrested for the injury done him: *Gilbert v. Emmons*, 42 Ill. 143.

For acts done by an officer beyond the authority of his process, the party at whose instance the process was issued, is not responsible unless those acts were done by his direction: *Adams v. Freeman*, 9 Johns. 117. But where process which is itself regular is abused by the advice of a party, he is liable for such abuse: *Snydacker v. Brosse*, 51 Ill. 357.

LIABILITY OF ATTORNEY.—An attorney who sues out void process upon which a party is arrested, is liable therefor: *Barker v. Braham*, 3 Wils. 368. So when he causes one to be arrested on a *ca. sa.*, issued on a judgment which has been discharged under the provisions of an insolvent act: *Deyo v. Falkenburgh*, 5 Hill, 242. So, generally, where he maliciously and illegally sues out and directs the execution of process upon which a party is arrested: *Green v. Elgie*, 5 Q. B. (5 Ad. & El. N. S.), 99; *Codrington v. Lloyd*, 8 Ad. & El. 449; S. C., 3 Nev. & P. 442; *Warfield v. Campbell*, 35 Ala. 349. So, where he knows that his client has no legal claim, or maliciously and without probable cause and of his own head, has a party arrested upon a just claim: *Barnap v. Marsh*, 13 Ill. 535; Cooley on Torts, 131; 2 Hilliard on Torts, 490.

ROGERS v. JONES.

[1 WENDELL, 237.]

LAND UNDER WATER PASSES BY A CONVEYANCE by metes and bounds, if included within the specified boundaries.

LAND COVERED BY ARMS OF THE SEA OR BY NAVIGABLE RIVERS, so far as the tide ebbs and flows, belongs to the king at common law, who may grant the same to a subject.

PRIVILEGE OF FISHING IN NAVIGABLE RIVERS and arms of the sea belongs, *prima facie*, to the king, and is public, but an individual may by grant or prescription acquire an exclusive right of fishing therein. Nor is there any prohibition of such grants in *Magna Charta*.

PATENT TO INHABITANTS OF THE TOWN OF OYSTER BAY from Sir Edmond Andross, in 1677, conveyed an exclusive right of fishing in the waters included within the grant, and such right being the common property of the inhabitants, may be governed and regulated by rules adopted in town meeting.

LEGISLATIVE CONTROL OVER PUBLIC STREAMS and rights of fishery therein, so far as may be necessary to protect navigation and preserve the fish from destruction, is not prejudiced by a grant to individuals of the soil under such streams, or of an exclusive privilege of fishing in them.

VALIDITY OF BY-LAW ON SUBJECT REGULATED BY STATUTE.—A municipal by-law imposing penalties on offenses within the jurisdiction of the corporation is not necessarily invalid because there is a statute imposing penalties for the same offenses.

ERROR to the common pleas, in an action brought by Jones, as supervisor of the town of Oyster Bay, before a justice of the peace, to recover a penalty imposed by a by-law passed by a town meeting of said town April 5, 1825, prohibiting all persons

not inhabitants of the town from taking oysters in the creeks or harbors of said town, and granting the penalties forfeited to persons appointed to superintend the oystering. The declaration charged the defendant with having taken oysters contrary to the provisions of this by-law. The defendant demurred and the plaintiff joined therein. The justice gave judgment for the plaintiff, from which the defendant appealed to the common pleas, where the plaintiff again had judgment, to reverse which this writ of error was brought.

Though the issue before the justice was on a question of law, it was nevertheless shown and admitted that on September 29, 1677, Sir Edmond Andross, governor of New York, under the duke of York, granted a patent to certain persons for and on behalf of themselves and their associates, the freeholders and inhabitants of the town of Oyster Bay, a tract of land particularly described by metes and bounds, including the township of Oyster Bay, "with all the necks of land and islands" within the said bounds, "together with all the woodland, plains, meadows, pastures, quarries, marshes, waters, lakes, rivers, fishing, hawking, hunting, and fowling, and all the other profits and emoluments, etc., and all privileges and immunities belonging to a township within the then government;" that the by-law of April 5, 1825, the provisions of which are stated in the opinion, was duly passed in town meeting, as alleged in the declaration; and that the defendant, being a citizen of the state of New York, on April 8, 1825, took certain oysters within the limits of the patent aforesaid, as charged in the declaration. It was stipulated that the cause should be decided here on its merits.

D. Rogers, plaintiff in error, in *propria persona*, argued: 1. That by the common law the right of fishing in navigable rivers and arms of the sea is common, and no exclusive right thereto can exist except by a grant or prescription extending back as far as Henry II., and that the prerogative of granting free and several fisheries, first claimed by the Normans, was deemed a usurpation, and was restrained by *Magna Charta*, citing 2 Bl. Com. 39; 3 Cruise Dig. 297; Bac. Abr., Prerogative, D, 156; 1 Salk. 357; 2 Id. 637; Bro. Abr., Custom, 46; 6 Mod. 73; 1 Id. 105; 2 H. Bl. 182; Willes, 265; 2 Bos. & P. 472; Vattel's Law of Nations, b. 1, c. 20, p. 168; Id., c. 23, p. 185. So under the civil law: Coop. Justinian, lib. 2, secs. 1, 6, 7, 8; *Hooker v. Cummings*, 20 Johns. 90 [11 Am. Dec. 249]; 13 Id. 497; 17 Id. 195 [*People v. Platt*, 8 Am. Dec. 382]; *Carson v. Blazr*, 2 Binn. 475 [4 Am. Dec. 463]; *Arnold v. Mundy*, 1 Halst. 1 [10

Am. Dec. 856]. 2. That the patent of 1677 did not confer an exclusive right of fishery, but simply defined the boundaries of the town, and if such exclusive right had been granted it must have been by express words and not by implication; and, further, that the patent could not be supported as granting an exclusive right, because this would be a legislative act (*Campbell v. Hall*, Cowp. 204), and the colonial assembly was not established until 1683. 3. That no right to pass this by-law was conferred by statute, because the several towns were only authorized to establish rules and regulations relative to their common lands, meadows, and other commons, and this did not include fisheries, particularly free and exclusive rights of fishery: Walk. Dict., "Common," 291; 2 Bl. Com. 21, 32, 34, 39. That to enable a town to enact rules and regulations relative to lands it must have the property in the lands; that the extension of the boundaries of a town over a bay or into a sound is only for purposes of jurisdiction and confers no right to the soil: *Palmer v. Hicks*, 6 Johns. 183; and that to convey title to the soil where it is under water it must be described as land covered with water: 2 Bl. Com. 19. 4. That this by-law was not a regulation but a prohibition, and was objectionable also in giving the forfeiture to individuals. 5. That since the revolution the right of regulating the use of navigable streams and the taking of fish therein belongs to and has been frequently exercised by the legislature, which is significant of the legislative idea that the soil and the fish in such streams belong to the public.

D. S. Jones, for the defendant in error, claimed: 1. That the inhabitants of the several towns of the state were authorized by statute to establish rules and regulations for the government and protection of their common lands, meadows, and other commons. 2. That by the patent of 1677, the land within the designated boundaries, whether covered by water or not, and the exclusive right of fishing within those limits, were granted to the town of Oyster Bay, and became a part of its common lands, meadows, and other commons. 3. That Charles II. had full right and power, as lord and proprietor of all the lands in his dominions, to grant to the Duke of York the title to the soil under navigable waters, and exclusive rights of fishery in those waters within the limits of the patent now in question, and did so grant them, and that his authority to do so was not restricted by *Magna Charta*, as claimed for the plaintiff in error, citing 2 Bl. Com. 52; 1 Id. 264; 6 Com. Dig., D, 63; 5 Id., Navigation, A, 3, 7, B; Harg. Law Tracts, c. 5, p. 17; and commenting at

length on the authorities cited on this point by the plaintiff in error.

By Court, WOODWORTH, J. (after stating the pleadings and the evidence in the cause). There is a written stipulation that this cause be decided on the merits. The pleadings are somewhat informal, but, arising in a justice's court, we are to consider the case in the same manner as if the plaintiff had stated all the facts of the case in his declaration, and the defendant had demurred to the same. The justice gave judgment for the plaintiff. The defendant appealed to the common pleas, where the judgment of the justice was affirmed. We are now called on to determine whether the plaintiff is entitled to recover. The cause has been ably and most elaborately argued by the plaintiff in error and the counsel for the defendant. Several points raised by the plaintiff in error I deem it unnecessary to consider, having arrived at a conclusion that the cause will depend on the decision of the following questions: 1. Has the plaintiff below shown a title in the town of Oyster Bay to the premises in question? 2. If he has, then, in consequence of the by-law passed by the town, is the plaintiff entitled to sustain this action?

I observe preliminarily, that on the first point it will not be necessary to enter upon an extensive field of argument, being of opinion that the principles involved in the decision of *Gould v. James*, 6 Cow. 369, do substantially decide the first question; but as this point is one of great importance, and some judges, particularly in a sister state, have expressed opinions at variance with the doctrines in *Gould v. James*, I will venture to enlarge a little upon that case, and very briefly examine the principles upon which this cause must depend.

It is contended by the plaintiff that the town has no right of property in the lands where the oysters were taken, because the right of soil beneath the water in the harbor of Oyster Bay never passed by the terms of the patent. It can not be doubted, that when a patent or grant conveys a tract of land by metes and bounds, the land under water, as well as other land, will pass, if the land under water lies within the bounds of the grant. A contrary doctrine would exclude the lands under the water of lakes and streams not navigable. Scarcely a patent ever issued by this state, that does not include one or the other, and as far as I know, no question has ever been raised on this ground. The authority cited from 2 Bl. Com. 19, does not bear out the position, but establishes the contrary. The author states, that if a

man grants his lands, he grants all his mines, woods, waters, etc., as well as his fields and meadows; but by a grant of water merely, nothing passes but a right of fishing.

It follows, therefore, if the grant was valid, the town of Oyster Bay acquired not only a right and title to the land under water, but to the waters themselves comprised within the bounds of the patent. If the doctrine contended for by the plaintiff in error is well founded, there has been great error in the course pursued by the sovereign power of this state ever since it became a free and independent government. It is well known that numerous grants have been made from time to time by the commissioners of the land office of lands under the waters of the Hudson, all which have proceeded on the ground that it was the undeniable right of the people of this state to make such grants. Until very lately, I have not understood that the power was questioned. It is here proper to observe that this principle does not at all conflict with the doctrine laid down by writers on national law, who declare the air, running water, the sea, etc., are common property: Vattel, b. 1, c. 23; sec. 280, 287; Grotius, b. 2, c. 2, sec. 3. The same writers, however, admit that the various uses of the sea near its coast render it very susceptible of property; and rivers are susceptible of property because confined in banks. Such places may be appropriated by the people to whom they belong, and the productions within reach, in the same manner as the lands they inhabit: Azuni, pt. 1, c. 2, art. 1, sec. 3.

If we examine the common law, it will be found to sanction this broad principle, "that the king is the universal lord and original proprietor of all the lands in his kingdom, and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services:" 2 Bl. Com. 52; 6 Com. Dig., D, 63. The right of the king extends over all lands, as well such as are covered with water, as such as are not. In England, it hath always been holden that the king is lord of the whole shore. He has the property *tam aqua quam soli*, and all profits in the sea, and all navigable rivers. So, also, he has the property of the soil in all rivers which have the flux and reflux of the sea, and not the lord of the manor adjoining, without grant or prescription; and every arm of the sea or navigable river, so high as the sea flows and reflows, belongs to the king; but by grant or prescription, a subject may have the interest in the water and soil of navigable rivers: 5 Com. Dig., Navigation, A, 3, and

B. Sir Matthew Hale, in his treatise *De Jure Maris* (Hargrave's Law Tracts), considers this right of the king to consist in a right of jurisdiction and a right of ownership; that a subject may have this right either by the king's grant, and this without question, or by custom or prescription. The king may grant fishing within a creek of the sea, or within some known precinct that hath known bounds, though within the main sea; he may also grant that very interest itself, viz., a navigable river that is an arm of the sea, the water and soil thereof: Sir M. Hale's *De Jure Maris*, c. 5, pl. 17.

It thus appears, that by the common law the king was seised of all the lands under the navigable waters of his realm, and entitled to grant and convey them. I do not find by any authority that this right was ever considered a usurpation. It is argued, however, that the exercise of such a power was prohibited by *Magna Charta*. The sixteenth chapter of *Magna Charta* (9 Henry III.) is supposed to contain the prohibition; it is in the following words: "*Nullas riparias defendantur de castero, nisi illas quæ fuerunt in defenso tempore Henrici regis, avi nostri, et per eadem loca et eosdem terminos, sicut esse consueverunt tempore suo.*" Lord Coke's comments on this chapter are as follows: "That no owner of the property of rivers shall so appropriate or keep the river several to him, to deprive or bar others either to have passage or fish there, otherwise than they were used in the reign of king Henry II. This statute, saith the Mirror, is out of use, for many rivers are at present appropriated and fenced in, and put in defense, which used to be common to fish in and use, in the time of king Henry II."

Even upon the supposition that Lord Coke was not correct in saying the statute was out of use, I do not perceive any prohibition of the right claimed for the king; and, as far as I can discover, both before and since the reign of Charles II., from whom the Duke of York derived his title, the right of the king to grant several fisheries and the lands under waters of navigable rivers and arms of the sea, has, in England, been considered as well settled.

Sir Matthew Hale, *De Jure Maris*, pl. 7, has explained the statute of *Magna Charta*, chapter 16: "That before the statute, it was frequent for the king to put as well fresh as salt rivers in *defenso* for his recreation; that is, to bar fishing and fowling in a river till the king had taken his pleasure or advantage of the writ or precept, *de defensione riparias*," etc. The object of the statute seems to have been to prevent the king from putting any

rivers in *defenso* for his recreation, except such as had been put in defense in the time of Henry II., his grandfather, and was intended to prohibit the exercise of his ancient prerogative for his own personal pleasure, but not applying to the owners of the banks of rivers or any other individuals. Notwithstanding this statute, the king, although restricted as to the occupancy of rivers for his pleasure, was at liberty to grant the land, under the rivers and navigable waters in his realm, at his will and pleasure. Without going into a specification, I only observe that several grants are stated by Sir Matthew Hale, subsequent to *Magna Charta*: Hale, *De Portibus Maris*, pl. 51, 68, 109, 110.

The case in 1 Mod. 106, was decided by Lord Hale. He there says: "That in an action of trespass for fishing in a river that flows and reflows, and in an arm of the sea, it is *prima facie* a good justification to say that the *locus in quo* is *brachium maris in quo unusquisque subjectus dom. Regis habet et habere debet liberam piscariam*, and if any one will appropriate a right to himself, the proof lieth on his side." This *prima facie* right is undoubted, and may be exercised until an individual proves he has the right, which may be done by grant or prescription. Such is evidently the language of this case. It is true that in *Warren v. Matthews*, 1 Salk. 357, and 6 Mod. 73, the same case, where one claimed *solam piscariam* by grant from the crown, there is this dictum of Lord Holt: "The subject has a right to fish in all navigable rivers, as he has to fish in the sea." I have looked at the cases referred to in the margin, and do not find that they support the doctrine. Indeed, one of the cases, *Davies*, 57, decides that the king may grant the franchise of a fishery in a navigable river. As the cases in 6 Mod. and 1 Salk. are very briefly reported, and are not supported by the authorities cited, there is good ground to believe the case itself is misrepresented. In 4 Burr. 2162, *Carter v. Murcol*, Lord Mansfield's remarks are in accordance with the view I have taken. He observes: "In navigable rivers the fishery is common; it is *prima facie* in the king, and is public. If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him unless he can prove such right." An again, that an exclusive privilege of fishing, although it be in an arm of the sea, is consistent with all the cases. Such a right shall not be presumed, but the contrary *prima facie*; but it is capable of being proved.

Justice Yates remarks on the case, in *Davies'* reports, which

is referred in support of Lord Holt's opinion: He says it is agreeable to the law there advanced that the crown may grant a several fishery in a navigable river where the sea flows and re-flows, and in an arm of the sea. I deem it unnecessary to cite other authorities. Many more might be adduced, but enough has been shown to satisfy my mind that the patent of Sir Edmond Andross, emanating mediately from Charles II., did convey to the inhabitants of Oyster Bay all the lands under water within the bounds of that grant, together with the exclusive right of fishing in the waters within the same. The case of *Gould v. James*, in 6 Cow.,¹ which declares that a several fishery in an arm of the sea, where the tide ebbs and flows, may be derived from a grant or prescription, appears to be supported by the concurrent authority of the English law.

The second question may be disposed of in few words. The by-law contains three sections: 1. That no person, not an inhabitant of Oyster Bay, be allowed to take oysters in the creeks or harbors, under the penalty of twelve dollars and fifty cents. 2. That no person be allowed to take oysters but from the first of November to the first of March. 3. Certain persons are named to receive the fines to their own use.

The plaintiff in error contends that the by-law is void on several grounds: 1. That the town can not prohibit, but may regulate; 2. That the penalty is given to individuals. A recovery may be had under the second section, which is clearly a regulation as to the times of taking oysters; and gives the penalty, generally, without specifying for whose use. If the objection urged as to the prohibition and appropriation of the penalty were fatal as to the first and third sections, still the second might be valid; for a by-law may be good in part and void for the rest: 2 Kyd on Corp. 155.

This by-law was undoubtedly made under the fifth section of the act to amend the act relative to the duties and privileges of towns, passed March 19, 1813: Stat., vol. 6, b. 207. By this section, the individuals of every town are authorized to make such prudential rules and regulations as they judge necessary and convenient for the better improving their common lands in tillage, pasturage, or any other reasonable way, and protecting the same from any trespass; for directing the use and management, and the times and manner of using their common lands and meadows, and the other commons, and impose penalties on the offender, whether he resides within the town or not, not ex-

ceeding twelve dollars and fifty cents; and the penalties so recovered shall be applied in such manner as the inhabitants of the town shall direct. This act extended to the regulation of the common property of the town, of which the premises in question are presumed to be a part. The inhabitants, for whose benefit the grant was made, have treated it as such in the by-law, and there is no evidence that any individual has an estate in severalty in the same.

The legislature have at various times passed laws regulating fisheries, and declaring certain streams public highways. This right is not inconsistent with the claim of an individual, that he owns the fishery, or the soil under the water. In *Cooper v. Cummings*, 20 Johns. 90,¹ Chief Justice Spencer observes: "These will prove nothing, for the legislature has confessedly the right of regulating the taking of fish in private rivers, and do every year pass laws for that purpose, as to rivers not navigable in any sense, and which are unquestionably private property."

It is admitted that notwithstanding a grant to an individual, the public have an interest in the waters granted. Lord Hale has accurately defined it, *De Jure Maris*, p. 22. Speaking of the private interest of the subject, he observes: "This interest or right must be so used as that it may not occasion a common annoyance to passage of ships or boats; for the *jus privatum* must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use. 2. That the right a subject hath in any public or private river or creek, fresh or salt, is subject to the laws for the conservation of fish or fry." The individual right, then, is subject to the interference of the legislature, to the extent before mentioned, but no farther. Such laws, therefore, are no invasion of the right of the individual; his right is not absolute and unlimited over the property granted, but qualified by these implied reservations.

But it is said that the by-law of a town or a corporation is void, if the legislature have regulated the subject by law. If the legislature have passed a law, regulating as to certain things in a city, I apprehend the corporation are not thereby restricted from making further regulations. Cases of this kind have occurred, and never been questioned on that ground; it is only to notice a case or two out of many. The legislature have imposed a penalty of one dollar for servile labor on Sunday; the corporation of New York have passed a by-law, imposing a pen-

1. *Hooker v. Cummings*, 20 Johns. 90 [11 Am. Dec. 249].

alty of five dollars for the same offense. As to storing gunpowder in New York, the legislature and corporations have each imposed the same penalty. Suits to recover the penalties have been sustained under the corporation law. It is believed that the ground has never been taken that there was a conflict with the state law. One of these cases is reported in 12 Johns. 122. The question was open for discussion, but not noticed. If it be admitted that when the legislature had passed a law regulating the fishery, it would not be competent for the town to pass a by-law, the answer here is, that the legislature have not legislated on the case before us; for the act, vol. 4, L, 248, which prohibits persons residing out of this state from taking shell or other fish in any of the waters of this state, does not apply. Here it is admitted that the plaintiff in error is a citizen of this state. There being then no conflict of regulations, it will scarcely be contended, that after the legislature in 1823 had expressly delegated to the towns the power of regulation, the by-law passed in pursuance of it is a nullity.

Upon the whole case, I am of opinion that the judgment of the court below be affirmed.

NAVIGABLE RIVERS AND RIGHTS OF FISHERY THEREIN. — This subject is examined in the note to *Arnold v. Mundy*, 10 Am. Dec. 385. See, also, *Commonwealth v. Chapin*, 16 Id. 386, and other cases in the American Decisions, cited in the note thereto. That the right of fishing in Oyster Bay belongs exclusively to the inhabitants of the town of Oyster Bay, is held on the authority of the principal case, in *Fleet v. Hegeman*, 14 Wend. 45. Its authority is also recognized for the general doctrine that the king, and the state, as his successor, own, and may grant the soil under navigable waters, subject to the public right of passage, in *Furman v. City of New York*, 5 Sandf. 53; *People v. Vanderbilt*, 26 N. Y. 293; *Nott v. Thayer*, 2 Bos. 25; *People v. Schermerhorn*, 19 Barb. 554. But it was said in *Lowndes v. Dickerson*, 34 Barb. 591, *per* Brown, J., to be questionable whether the king, without the concurrence of the legislative department, could grant an exclusive right of fishing in public waters. In *Nostrand v. Durland*, 21 Barb. 482, it is held, referring to *Rogers v. Jones*, that in order to pass the title to land, the word "land," or something equivalent thereto, must be used in the conveyance, and that a conveyance of land includes the water which covers it.

PEOPLE v. CORPORATION OF BROOKLYN.

[1 WENDELL, 318.]

AFFIDAVITS IN REPLY TO A RETURN to an alternative writ of mandamus are inadmissible.

POWER TO DISCONTINUE PROCEEDINGS FOR OPENING STREETS.—The trustees of a municipal corporation have no power to discontinue proceedings for

opening a street after rights have become vested under such proceedings.

NO POWER TO DISCONTINUE AFTER COMMISSIONERS' REPORT CONFIRMED.—

After the trustees, in such a case, have confirmed the report of the commissioners of appraisement, they are *functi officio*, and can not discontinue the proceedings, the rights of parties having become vested thereunder; but, until then, they have a discretion in the matter.

MANDAMUS LIES WHERE A PARTY HAS A RIGHT to have a thing done, and no other specific means of enforcing it.

RIGHT MUST BE COMPLETE and not inchoate to authorize a *mandamus*.

WHERE A PARTY HAS AN ADEQUATE REMEDY by action, *mandamus* does not lie.

PARTIES HAVING ACQUIRED A RIGHT TO MONEY SPECIFICALLY ASSESSED in their favor in proceedings for opening a street, may recover it in *assumpsit*, and *mandamus* will not lie to compel its payment.

MOTION for a *mandamus* on the relation of certain parties, in whose favor damages had been assessed by commissioners appointed on a petition to open a certain street in Brooklyn, to compel the trustees of the corporation to file the report of the said commissioners. An alternative writ having been granted, the trustees made their return at this term, with sundry affidavits corroborating the same, in reply to which a number of affidavits were submitted by the relators, to which the counsel for the trustees excepted as inadmissible. The other material facts are stated in the opinion.

J. Greenwood, for the relators.

S. A. Foot, for the trustees.

By Court, SAVAGE, C. J. The first question to be determined is, Upon what papers are we to act? We have before us the affidavits upon which the alternative *mandamus* was granted, the return of the trustees, and a great number of affidavits, which are intended as a replication to the return of the trustees. These latter affidavits are altogether inadmissible. The relators stated their case in the first instance; upon that, we called upon the trustees to show cause why they had not proceeded. They have shown cause by their return; and, upon the original papers and the return we are to act. Should we receive the additional affidavits of the relators, they may contain new matter, and then the trustees should be permitted to answer; and thus the proceedings might be continued to an unreasonable and almost interminable extent. I will here remark that the admission or rejection of affidavits to oppose or support the report of commissioners of estimate and assessment, in the city of New York, has no analogy to this proceeding. Here we are acting as

a court of common law, revising the proceedings of an inferior tribunal, to see whether they have done their duty. In the other case, we are mere appellate commissioners, and inquiring whether the commissioners below have acted discreetly.

By the eighteenth section of the act to reduce the law incorporating the village of Brooklyn, etc., into an act, passed April 3, 1827, the trustees on receiving the petition therein mentioned, are authorized, but not compelled, to lay out and make such new streets as they shall think necessary. In this respect their powers are analogous to those possessed by the corporation of the city of New York; and the decisions in relation to the one are applicable to the other. Under these powers the trustees resolved (the preliminary proceedings having been had which are mentioned in the act) to proceed and open a street called Adams street, from its then southerly termination to Fulton street. The commissioners were regularly appointed to appraise the property to be taken for the street. These commissioners made their report in due form. The act requires the trustees to cause such report to be filed with the clerk of the court of common pleas, at the next term thereof; and that court are either to confirm the report, or refer it back to the same, or to new commissioners. The trustees, after receiving the report, refuse to file the same, and the question is whether the power of this court shall be exerted to compel them to file it? The reason assigned by the trustees is that the assessment of the property of the relators is extravagantly high, and that those who will necessarily be assessed to pay the assessment, have remonstrated against any further proceedings.

Assuming the fact to be as stated by the trustees, have they a right to discontinue these proceedings? And, whether they have or not, is this a case in which a mandamus ought to be granted?

1. Have the trustees a right to discontinue? In the case of *Dover street*, 18 Johns. 506, commissioners had been appointed and reported. Their report was set aside and other commissioners appointed, who refused to act. A motion was made for leave to discontinue. The motion was opposed on the ground that those whose property was to be taken had acquired vested rights to the compensation; but this court said that they considered the application as if made before the appointment of commissioners, and granted the motion, saying that no rights vested before commissioners were appointed or report made.

In the matter of *Beekman street*, 20 Johns. 269, a similar application was made after the second set of commissioners had

been appointed, but previous to their report. The motion was denied on the ground that the court had not the power to grant it. The chief justice, in giving the opinion of the court, says, that if the court had the power, they would not exercise it in that case, and principally on the ground that upon the faith of the proceedings of the corporation several persons had made purchases of lots which would be depreciated in value by such discontinuance; that the corporation, having determined to make the improvement, and having procured the appointment of commissioners who had entered upon their duties, it was not competent for the corporation to resume the subject and vacate their acts. Pending the application to this court, and previous to the appointment of the second set of commissioners, the corporation applied to the court of chancery for an injunction to restrain certain persons from erecting buildings on Beekman street, on the ground that such erections would enhance the damages to be paid by the contemplated improvement, which was denied by the chancellor, who said that no rights had vested; and he suggested that the corporation were not bound to go on, but might recede and abandon their plan at any time before the commissioners of assessment should have reported, and their report should have been confirmed; that on the confirmation of the report, rights then become acquired and vested in the parties respectively; the corporation become seised and may take possession of the land, and the individual owners become entitled to the damages assessed: 6 Johns. Ch. 49, 50. Both the chancellor and this court conceded that there was a time when it was discretionary with the corporation to discontinue further proceedings. This court seemed to suppose that after the commissioners had entered upon their duties the corporation must go on. The chancellor supposed that the corporation might recede at any time before the confirmation of the report of the commissioners, but not after, because then mutual rights became vested. The expression of this opinion was not called for by the decision in either case, and is, therefore, not authority, strictly speaking. The reason assigned by the chancellor seems to me to be the criterion by which to test this question. When do the rights of the parties become vested? Can the corporation take possession of the land to be taken for the street before confirmation of the report? And can the person in whose favor damages are assessed prosecute for the amount of the assessment upon the mere making of the report?

The case of *Stafford v. Mayor etc. of Albany*, 6 Johns. 1, and

7 Id. 541, was an action for the amount of an assessment. In that case damages were assessed by a jury, and judgment of the mayor's court was rendered thereon according to the statute under which the proceedings were had. The mayor's court afterwards set aside the assessment, which this court held irregular and unwarranted. They say, when the assessment was confirmed the court had no further powers; they were *functus officio*. The same doctrine was recognized in the case of Third street, in the city of New York, where it was held that a report, being confirmed, becomes irrevocable unless it be waived by all parties concerned. So, also, in *Hawkins v. The Trustees of Rochester*, 1 Wend. 54 [*ante*, 462], we held that the plaintiff, by the verdict of the jury and the judgment of the president of the village thereon, acquired a vested right to the sum awarded to him as damages, which it was not in the power of the trustees to defeat, by discontinuing the proceedings in relation to the street. By the act in question, the confirmation of the report, and the payment or tender of the sums awarded, shall not be conclusive, and authorize the trustees to enter upon the lands; and according to the cases just referred to, after the confirmation of the report, should the trustees refuse to proceed, they would be liable to pay the sums assessed to the relators. It appears, then, that after the confirmation of the report, rights become vested in individuals, and the trustees have no discretion as to discontinuing the proceedings. But have they not that discretion so long as they do not, by the exercise of it, affect the vested rights of others? It seems to me such must be the conclusion from the cases cited; and there appears to be a fitness and propriety in allowing such discretion to the trustees, because, after presentment of the report of the commissioners for confirmation, the trustees can not object to the report, or show that the assessment is too high, the right of appeal being given by the act only to the party in whose favor the report is made, in case he shall conceive himself aggrieved in the premises. It is true, indeed, that in the case of *Beekman street*, 20 Johns., the court said, that if they had the power to grant a discontinuance, they would not do it; not because others had vested rights, but because purchases had been made on the plighted faith of the corporation; and if the improvement failed, there would be great individual pecuniary sacrifices. They did not say that in that case they would compel the corporation by mandamus to proceed, though such would seem to be the inference.

A mandamus issues, in general, in all cases where the injured party has a right to have anything done, and has no other specific means of compelling its performance. There must be a right, therefore, without any other adequate remedy, or a mandamus does not issue; and I incline to the opinion that the right must be complete, not inchoate. The cases cited, in which this court has compelled supervisors to raise money assessed to individuals for damages on opening roads: 19 Johns. 272; 5 Cow. 292, are cases where the right of the relators was complete, by the assessment of the jury and justices, and the supervisors had no discretion about it. Such discretion was subsequently given to the supervisors: Statutes, vol. 7, b. 229; Rev. Stat. c. 16, tit. 1, art. 4, sec. 69.

My conclusion, is that until the proceedings have progressed so far as to give mutual rights to the parties, the trustees have a discretion, and may refuse to proceed; but after rights become vested, by virtue of these proceedings, they can not refuse, with impunity, to proceed. But does it follow that a mandamus is the proper remedy? If the relators have a right to the amount assessed in their favor, by virtue of the assessment alone, then an action lies, as is decided in the cases cited from 6 Johns. and 1 Wend. [*Hawkins v. Rochester*, ante, 462]; and even if the right is not so complete as to sustain an action for the money, yet, if the defendants have been guilty of a violation of duty, to the prejudice of the relators, it does not follow that a mandamus is the proper remedy. In the *matter of Shipley*, 10 Johns. 484, a mandamus was asked for, to compel a bank to permit a transfer of certain shares in the stock of the bank; but the court said: "The applicants have an adequate remedy, by a special action on the case, to recover the value of the stock, if the bank have unduly refused to transfer it?" In the *King v. Bishop of Chester*, 1 T. R. 396, 404, the king's bench refused a mandamus, because the party had a specific remedy by *quare impedit*; and Buller, J., says: "This court will not interpose by mandamus, unless the party making the application has no other specific legal remedy."

I am of opinion, therefore, that a mandamus ought not to be granted. If the relators have acquired a right to the money specifically assessed in their favor, then an action of assumpsit lies. If they have acquired any rights by the report of the commissioners, and have sustained damages by reason of the refusal of the trustees to perform their duty, then an action on the case lies to recover those damages; and, in either case, there is no

necessity for an exercise of the extraordinary power of this court by mandamus.

Motion for peremptory mandamus denied.

MANDAMUS, WHEN GRANTED.—See on this subject: *Commonwealth v. Rosseter*, 4 Am. Dec. 451; *State v. Bruce*, 6 Id. 577; *Runkle v. Winemiller*, 1 Id. 411; *Brander v. Justices*, 2 Id. 606; *Dew v. Judges*, 3 Id. 639; *Delacy v. Neuse River Navigation Co.*, 9 Id. 636; *American Asylum v. Phoenix Bank*, 10 Id. 112; *Hull v. Supervisors*, Id. 223; *State v. Dunn*, 12 Id. 25, and note; *Ex parte Jennings*, 16 Id. 447. That the party applying for a mandamus must have a clear legal right, and no other appropriate remedy is held on the authority of the principal case, among others, in *People v. Supervisors of Columbia Co.*, 10 Wend. 366; *People v. Canal Board*, 13 Barb. 443, and *People v. Stevens*, 2 Abb. Pr., N. S. 353. So, that where there is a remedy by action, mandamus will not lie, in *People v. Supervisors of Chenango Co.*, 11 N. Y. 573; *People v. Mead*, 24 Id. 122; *People v. Haws*, 37 Barb. 457; S. C., 24 How. Pr. 154; *People v. Croton Aqueduct Board*, 49 Barb. 264. The principal case is cited also in *Clark v. Miller*, 47 Barb. 42, to the point that a public officer owing a duty to an individual is liable for damages caused by a refusal or neglect to perform it.

MOWATT v. WRIGHT.

[1 WHEDELL, 355.]

MONEY PAID BY MISTAKE MAY BE RECOVERED in an action for money had and received.

MISTAKE MUST BE ONE OF FACT to entitle a party to relief in such a case.

MISTAKE OF LAW will not be sufficient in such a case, if there is no fraud or mistake of fact.

MISTAKE OF FACT, WHAT IS.—A mistake of fact occurs when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist.

MISTAKE OF LAW OCCURS where a party knows the state of the facts, but is ignorant of the legal consequences.

MONEY PAID UNDER COMPELSION OR WHERE UNDUE ADVANTAGE is taken of the party's situation, may be recovered, even though there is no mistake of law or of fact.

MONEY VOLUNTARILY PAID ON AN UNFOUNDED DEMAND, where the payee made the demand honestly and in good faith, and had brought an action to enforce it, and where the party paying supposed the facts to be just as they were, and made the payment as the cheapest mode of settlement, can not be recovered back.

LAPSE OF TIME, SHORT OF THE STATUTE OF LIMITATIONS, after an alleged payment by mistake, may, it seems, be taken into consideration in an action to recover the money.

ASSUMPSIT to recover one thousand dollars, alleged to have been paid by the plaintiffs to the defendant under a mistake and misapprehension of their rights. On the trial, at the cir-

cuit, it appeared that the money in question was paid by the plaintiffs to the defendant, Mrs. Wright, to compromise certain actions brought by her in 1821, to recover dower in certain premises, formerly owned by her late husband, which had been conveyed to the father of the plaintiffs, and which he had sold with covenant of warranty, the plaintiffs having, therefore, been vouched to warrant the title in said actions. A few days after the payment and compromise, a deed was discovered to have been executed by the defendant and her husband in 1784, shortly after their marriage, conveying the premises in which dower was demanded, to Colonel Burr. It appeared, however, that at the time of the payment the defendant, having been so advised, honestly believed that she was entitled to dower; that she had no recollection of having joined in a conveyance of the premises; and that before bringing her actions she made due inquiries of Col. Burr and others, who had subsequently owned the land, to ascertain whether she had ever released her dower therein. It further appeared that when they paid the money, they and their counsel were fully satisfied that the defendant had joined with her husband in a deed of the premises, whereby her dower was released, but that they did not know where the deed could be found, and were afraid to file a bill of discovery, for fear that the opposite party would destroy the deed if it was in their possession; and that they paid the money by advice of their counsel, as the cheapest and best way of settling and compromising the controversy. The question as to whether or not the defendant's claim of dower was fraudulently made, was left to the jury, but the judge instructed them that the money could not be recovered as having been paid by mistake or compulsion. Verdict for the defendant, which the plaintiffs now moved to set aside.

C. G. Troup, for the plaintiffs, in support of their right to recover the money as having been paid, not only under a mistake of the facts, but also by compulsion, cited 4 T. R. 431; ——— v. *Pigott*, cited in *Cartwright v. Rowley*, 2 Esp. N. P. 723; *Strange*, 915; 2 Burr. 1012; 15 Mass. 207; 3 Id. 74; *Chatfield v. Paxton*, 2 East, 471, n; 1 Com. Dig. (by Hammond), 323; Action upon the case upon Assumpsit, F, 8.

S. G. Raymond, for the defendant, claimed: 1. That the payment was voluntary, and that, therefore, the money could not be recovered: 1 Esp. 84; Esp. N. P. 279; 2 East, 409; 4 Johns. 240 [*Hall v. Shultz*, 4 Am. Dec. 270]; 1 T. R. 186; 2 W. Bl.

825; 2 Burr. 1012; 5 Ves. 14; 2. That if there was a mistake, it was mutual, and there could be no recovery: *Taylor v. Hare*, 1 New Rep. 260; 2 Atk. 592; 3. That the payment was made upon a compromise, and that the colorable title of the plaintiff in the actions of dower, and the surceasing of those actions, were a sufficient consideration for the compromise: *Latch*. 142; *Dyer*, 272, 31 *in notis*; *Hob*. 216; 1 *Bibb*, 168; 2 *Id*. 449 [*Fisher v. May*, 5 Am. Dec. 626]; *Cann v. Cann*, 1 P. Wms.; 1 *Madd*. 75; 1 *Atk*. 10; *Cro. Eliz*. 70; 4. That the plaintiffs had slept on their rights, and it would be inequitable to compel the defendant to refund: *Nichols v. Leeson*, 3 *Atk*. 575; *Skyring v. Greenwood*, 1 *Car. & P*. 517.

By Court, SAVAGE, C. J. The question is, whether the thousand dollars were paid by mistake of the facts or compulsion of law; or whether it was voluntary, and to compromise a suit and a disputed claim. At the trial it was attempted to show fraud in Mrs. Wright, but that was satisfactorily rebutted. She was married at seventeen years of age, and soon after executed the conveyance of these lots. In 1821 she was informed by a Mr. Baldwin that she had a right of dower in certain lots; but she had forgotten that her husband had ever owned those lots, and took pains to make all possible inquiries for the conveyance before she brought her suits. The jury passed upon the question of actual fraud, and found a verdict in her favor. On the question of mistake and compulsion, the judge decided that the plaintiffs were not entitled to recover. It appeared that the attorneys and counsel for the defendants in the dower suits were of opinion that a release had been executed by Dr. Wright, in which the defendant had joined. A lease for one year from Dr. Wright to Col. Burr was found; and it was therefore believed that a proper release had also been executed. The testimony is uncontradicted that the payment of the one thousand dollars was voluntary, as a compromise of Mrs. Wright's claim, and of the claim of the heirs of her husband; but it is contended that the payment was compulsory, inasmuch as a suit was brought, and at the time of the compromise, the conveyance from Mrs. Wright could not be found.

The action for money had and received, in general, lies for money which, *ex æquo et bono*, the defendant ought to refund, as for money paid by mistake; or upon a consideration which happens to fail; or for money obtained by imposition, or extortion, or oppression; or by taking an undue advantage of the plaintiff's situation: 2 Burr. 1012. A mistake which entitles a

party to sustain this action must be a mistake of fact. Where there is no fraud nor mistake in matter of fact, if the law was mistaken, the rule applies that *ignorantia juris non excusat*: Doug. 471. An error of fact takes place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. But when a person is truly acquainted with the existence or non-existence of the facts, but is ignorant of the legal consequences, he is under an error of law: 2 Ev. Poth. App. 437. It is now generally conceded that the law is, as laid down by Buller, justice, Doug. 471, that the mistake must be a mistake of fact and not of law, though a very learned argument will be found in Evan's Pothier, sustaining the proposition that a mistake of either law or fact will entitle the party, paying money under it, to maintain this action to recover it back. Some of the earlier cases do not take the distinction; and De Grey, chief justice, in *Farmer v. Arundel*, 2 Bl. Rep. 824, 825,¹ says: Where money is paid by one man to another, on a mistake either of fact or of law, or by deceit, this action will certainly lie; but the later authorities contradict this proposition so far as regards a mistake of the law.

There are cases, also, of payment by compulsion, and by legal process, where the party has been subsequently permitted to recover it back. The case of *Astley v. Reynolds*, 2 Str. 915, was an action for money had and received. The plaintiff had pawned plate to the defendant for twenty pounds, and went afterwards to redeem it, and offered the principal and four pounds, which was more than legal interest; but the defendant demanded ten pounds, which the plaintiff paid, and then brought his action to recover the excess above lawful interest. It was contended that he could not recover, there being neither mistake nor force, and his remedy by trover being open to him after tender, and, therefore, he came within the rule that *volenti non fit injuria*. But the court said they considered it a payment by compulsion; that the plaintiff might have such immediate want of his goods that trover would not afford him a proper remedy; that *volenti non fit injuria* applies only where the party had his freedom of exercising his will, which this man had not. I presume there were facts in that case not reported from this remark, as there is nothing in the case to show that the plaintiff had not the liberty of exercising his will.

This case, Chief Justice Spencer, in *Hall v. Schultz*, 4 Johns. 245 [4 Am. Dec. 270], considers as overruled by *Knibbs v. Hall*,

1. 2 Wm. Bl. 824, 825.

1 Esp. 84, where, in an action for use and occupation, it had appeared that the plaintiff had let certain rooms to the defendant. The plaintiff demanded rent at twenty-five guineas; the defendant insisted he had taken them at twenty guineas; but on the plaintiff's threatening to distrain, defendant paid the twenty-five guineas. He now offered to show that the rent was really but twenty guineas, and to set off the five guineas in this action, as having been paid by compulsion. But Lord Kenyon was of opinion that this could not be deemed a payment by compulsion, as the defendant might, by a replevin, have defended himself against the distress.

There are cases, undoubtedly, where an undue advantage is taken of the party's situation, in which he may pay money, with knowledge of all the facts and the law too, and afterwards recover it back. Such was the case of — *v. Pigott*, cited in *Cartwright v. Rowley*, 2 Esp. 723, where the steward of an estate, being in possession of deeds wanted on a trial, charged extravagantly for producing them, and the money was recovered back from him in this action. The money was held not to have been paid voluntarily, but from necessity and the urgency of the case, as the plaintiff could not do without the deeds.

The case of *Cobden v. Kendrick*, 4 T. R. 431, has been relied on for the plaintiff. The facts were these: Previous to that suit, the defendant, K., had sued the plaintiff, C., on a promissory note; and after a writ of inquiry executed, the suit was compromised and part paid. Soon afterwards Kendrick told his attorney that he was glad it was compromised, for it was a lottery transaction, and he had given but ten pounds for the note which was for one hundred and fifty pounds; thereupon this suit was brought for the money so paid. No question was raised, but that the action was sustainable. It was a clear case of fraud. But in *Marriott v. Hampton*, 7 T. R. 269, the facts were more analogous to the case before us. H. had previously sued M. for goods sold, and which had actually been paid for and a receipt given; but not being able to produce the receipt, nor prove payment in any other manner, M. gave a cognovit and paid the money. Marriott afterwards found the receipt, and brought his action for money had and received; but Lord Kenyon held that money recovered under legal process, could not be recovered back, however unconscientiously retained by the defendant, and nonsuited the plaintiff. On a motion to set aside the nonsuit, the court said, that after the recovery by legal process there must be an end of litigation; and that it would tend to encourage the

greatest negligence, if a door were opened to parties to try their causes again, because they were not properly prepared with their evidence the first time. Neither of these cases can be said to be like this case; for, in the first, the recovery was on the ground of fraud, which is negatived here; and the last differs from this because there had been an actual judgment, though by cognovit, and here there was a compromise before judgment.

The cases founded on mistake seem to rest on this principle: that if parties, believing that a certain state of things exists, come to an agreement with such belief for its basis, on discovering their mutual error, they are remitted to their original rights. On this principle was determined the case of *Cox v. Prentice*, 3 Mau. & Sel. 344, where a bar of silver was purchased by the plaintiffs of the defendant, and paid for according to the number of ounces calculated by an assay master; but it being ascertained afterwards that a mistake had been made, by which they had paid more than the value, they brought their action and recovered the excess. Lord Ellenborough said it was a case of mutual innocence and equal error, and a proper case for such an action. But when a party pays money voluntarily, with full knowledge, or full means of knowledge of all the facts of the case, the party so paying can not recover it back: *Billie v. Lumley*, 2 East, 470. The ground on which the action was brought was that the money was paid under a mistake, by which the underwriter had paid an insurance, a material letter having been withheld at the time of insurance. At the trial that fact was contradicted; and the plaintiff then insisted, that the money having been paid under a mistake of the law, the action might be sustained; and so the judge ruled at *nisi prius*. But on motion to set aside the verdict, Lord Ellenborough said he never heard of any case, except *Chatfield v. Paxton*, where such a recovery was had; and that case was ultimately decided on some other circumstances; but it was so doubtful as not to be reported.

In *Brisbane v. Dacres*, 5 Taunt. 155,¹ Best, justice, gives a full statement of the case of *Chatfield v. Paxton*, having been counsel in the cause, from which it seems that the intimation given by Lord Kenyon at the trial, that ignorance of the law was a sufficient ground for the action, was abandoned, and the judges put it wholly on the ground that the plaintiff had not a knowledge of the facts. In the course of the argument, Best, sergeant, advanced this proposition, speaking of the doctrine of

1. *Brisbane v. Dacres*, 5 Taunt. 155.

Lord Ellenborough, in *Bilbie v. Lumley*, to wit: the money shall not be recovered back if it be consistent with honor and conscience to retain it; but otherwise it shall. Gibbs, justice, interrupted him, saying: "The principle has always been this: wherever the money has been paid in consequence of a demand as of right, then, although the demand was unfounded, the payment can not be recovered back." There is a case of money paid under distress for standings in a market; though the party had no right to distrain, the money could not be recovered back. The facts in the case then under argument were, that the plaintiff was captain of a ship under command of the defendant's testator, Admiral Dacers. The plaintiff had received a considerable sum for transporting specie, one third of which he paid to the admiral under a mistaken apprehension that he was entitled to it, and then brought his action to recover it back. In deciding the case, Gibbs, justice, says, "We must take this payment to have been made under a demand of right," and then repeats the doctrine above stated. He adds: "I think that, by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them." This was said under the supposition that there was a full knowledge of all the facts upon which the demand was founded.

In the case of *Bulkely v. Stewart*, 1 Day, 133,¹ the supreme court of Connecticut say: "This action does not lie to recover back money voluntarily paid on a claim which the party disputes, though he pay it, expressly reserving his right to litigate his claim." The cases in Massachusetts, where the plaintiff recovered, are cases where the money was paid under a mistake of the facts. Many more cases might be cited, but those already referred to show the principles upon which the action has been sustained, and upon which it has been defeated. In the present case, it now appears that the defendant had, in fact, no right to the money paid by the plaintiffs; but it was paid upon a claim of right, which was honestly made by her; and the plaintiffs here, who are virtually defendants in the dower suits, acted under as full a knowledge of the facts as the demandant. She, in truth, believed that she had never executed a deed; but the plaintiffs acted under the belief, as testified by the witnesses, that there was such a deed in existence, but for reasons, which are stated, they thought that the payment of the one thousand dollars was the shortest and cheapest way of settling the dispute.

1. *Bulkely v. Stewart*, 1 Day, 133.

This sum of money, then, was given to Mrs. Wright to quiet the claim, in the language of Mr. Justice Best. She had a right to consider it her own, without dispute. She has, probably, spent it, and "it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money."

I can not consider this as a case of mistake in fact, or of law. Mrs. Wright brought suits for a claim which she thought well founded. The defendants believed that there was a defense, but they could not produce the evidence of it, like the case of the lost receipt; they therefore paid a sum of money as the easiest and cheapest way of settling the claim. It is a voluntary payment, though they would not have made it could they have produced the evidence of their title at the time. It is now too late to call the settlement in question.

I am of the opinion that the motion to set aside the verdict be denied.

MONEY PAID BY MISTAKE.—As to the right of a party to recover back money paid by mistake, see *Garland v. Salem Bank*, 6 Am. Dec. 86, and *Waite v. Leggett*, 18 Id. 441. That a right of recovery exists in such cases, where there is mistake or ignorance as to material facts, but not where there is a mistake of law but no mistake as to the facts, is a point upon which *Mowatt v. Wright* is frequently cited as authority in the New York decisions; *Wheaton v. Olds*, 20 Wend. 176; *Rheel v. Hicks*, 25 N. Y. 291; *Chapman v. City of Brooklyn*, 40 Id. 380; *Supervisors of Onondaga Co. v. Briggs*, 2 Denio, 40; *Boyer v. Pack*, Id. 106; *Hargous v. Ablon*, 3 Id. 408; *Wyman v. Farnsworth*, 3 Barb. 371; *Lott v. Sweeney*, 29 Id. 92; *Grainger v. Olcott*, 1 Lans. 171; *Goddard v. Merchants' Bank*, 2 Sand. 253. That the action for money had and received is founded on principles of equity, and entitles the defendant to show, if he can, that he is not equitably bound to pay the money, is held on the authority of the principal case, in *Eddy v. Smith*, 13 Wend. 491.

JACKSON v. TOPPING.

[1 WENDELL, 386.]

BREACH OF CONDITION TO PAY GRANTOR'S DEBTS.—Where a deed is made by a father to his son in consideration of a covenant on the part of the grantee to maintain the grantor and pay his debts, on condition that if he fails to do so the grantor shall have a right of re-entry, the grantee may insist on having the justice of an alleged debt of the grantor established before paying it; but if he refuses to pay after it has been established by a board of arbitrators, there is a breach of the covenant and condition in the deed.

IF THE GRANTEE RELIES UPON PAYMENT OF THE DEBT to prevent a forfeiture of his estate, in such case he must prove such payment.

GRANTOR HAS AN ELECTION, in case of non-payment of a debt so established, either to insist upon the forfeiture, or to waive that remedy until an attempt has been made to enforce payment by action.

AFTER JUDGMENT ON THE AWARD, which remains unsatisfied, the grantor may bring ejectment to enforce the forfeiture.

WHERE THE GRANTEE HAS CONVEYED the premises to another, an action to enforce the forfeiture may be brought against the latter, who merely represents his grantor.

GRANTOR'S HEIR MAY AVAIL HIMSELF OF SUCH COVENANT, upon breach thereof after his ancestor's death, though he be not expressly named.

WHERE PART OF CONDITION PERSONAL TO GRANTOR.—Where the condition in such case is that the grantor may re-enter if the grantee neglects to pay the debts as covenanted, and suffers the grantor to be put to cost, trouble, and expense, the latter part of the condition is personal to the grantor, and, after his death, neglect to pay only need be shown to work a forfeiture.

GRAMMATICAL SENSE OF WORDS IN CONSTRUING A DEED need not be adhered to, where a contrary intent is apparent from the whole instrument.

"AND" MAY BE CONSTRUED TO MEAN "OR," in a deed, where, from the whole instrument, such appears to have been the intent of the grantor.

EJECTMENT, the lessor of the plaintiff claiming to recover one fourth of certain premises, as one of the heirs at law of David Reeves, senior, on the ground of a forfeiture of the estate by a breach of the condition in a conveyance of the same by the said Reeves, senior, to his son, David Reeves, junior, who had conveyed to the defendant. At the trial at the circuit, it appeared that the deed from Reeves, senior, to Reeves, junior, after reciting that the grantor, on account of age and infirmity, was incapable of managing his affairs, and that he had agreed to give his real estate to the grantee so that he should pay the grantor's debts, and afford him a maintenance, conveyed the premises in fee to the grantee to carry the agreement into effect, and in consideration of love and affection, and of the provisos, covenants, and conditions on the part of the grantee contained in said deed. The grantee covenanted to pay the grantor's debts, to indemnify and save him harmless from the same, and from all actions, damages, etc., arising from the non-payment thereof, and to provide the grantor and his wife a suitable and comfortable maintenance. The deed further contained a condition that if the grantee should neglect or refuse to pay and fulfill the conditions and covenants therein expressed, "and" should suffer the grantee to be put to any cost, trouble, or expense on account thereof, or should neglect or refuse to provide him a maintenance as specified, then in all, either, or any of the cases aforesaid, it should be lawful to and for the grantor, all and singular, the premises by the said conveyance granted, to take,

repossess, and enjoy, as in his former estate. The grantee entered and remained in possession until his conveyance to the defendant, July 9, 1823, shortly after the grantor's death. It further appeared that after the death of the grantor, but before the conveyance by the grantee to the defendant, the lessor of the plaintiff presented sundry demands to the grantee, D. Reeves, junior, for payment, including a note for five hundred and fifty dollars, dated August 6, 1817, from D. Reeves, senior, to the lessor of the plaintiff; that Reeves, junior, claimed that some of the demands were unfounded, and that the said note had been paid; that the plaintiff's lessor and the said D. Reeves, junior, on April 8, 1823, mutually submitted all the matters in controversy between them to arbitration; and that the arbitrators on the same day made their award that D. Reeves, junior, should on the eighth of June following pay to the lessor of the plaintiff six hundred and fifty dollars, and that the parties should mutually execute releases of all controversies, debts, demands, etc. It was further proved by one of the arbitrators, that the only demand allowed or considered by them in making their award was the note in question; that the plaintiff's lessor did not, before them, set up any claim to the premises now sued for, nor was the title thereto in any way drawn in question or passed upon by them. The note was put in evidence, and also the award, to which the defendant objected, because he was not a party to the submission. It further appeared that the plaintiff's lessor executed a release to D. Reeves, junior, on April 9, 1823, pursuant to the award, and that he brought an action against the said D. Reeves, junior, on the award, and obtained judgment in February, 1824, which judgment was not proved to have been paid. Verdict for the plaintiff, subject to the opinion of this court.

D. Robert, for the plaintiff, contended: 1. That the estate was forfeited by the neglect and refusal to pay the debt in question without showing that the grantor in his life-time was put to cost, trouble, or expense, by such refusal, and that the word "and" in the condition of the deed should be construed "or," in furtherance of the obvious intention of the instrument: 6 Johns. 54 [*Jackson v. Blaushan*, 5 Am. Dec. 188]. 2. That the indebtedness was proved, not only by the note but by the award, which was binding on the defendant as the grantee of D. Reeves, jun.: 1 Stark. Ev., pt. 2, pp. 192, 194; 4 Johns. 230 [*Jackson v. Bard*, 4 Am. Dec. 267]. 3. That the right to insist on the for-

feiture was not waived or lost by the submission to arbitration or by the action on the award.

S. B. Strong, for the defendant, claimed: 1. That to work a forfeiture under the deed it was necessary, not only to prove a neglect to pay but also to show that the grantor was put to cost, trouble, or expense; that this was plainly the grammatical sense of the words of the condition, which was formerly strictly adhered to in construing deeds: 2. Vern. 388; 2 Str. 1175; 3 Atk. 193; 1 Wils. 140; 3 T. R. 470; although a more liberal rule had been adopted as to wills: 6 Johns. 58 [*Jackson v. Blaushan*, 5 Am. Dec. 188], and that the grammatical construction should be preferred where a different one would work a forfeiture of the estate; as in this case, because restrictions on the title to realty are odious and not to be favored: Shep. Touch. 133; 4 Leon. 241; Co. Lit. 219, b; Litt. 128. 2. That the grammatical construction should prevail unless it would defeat the clear intention of the parties or work injustice, which would not be so here, for the right of re-entry was not necessary to secure payment of the debts or the comfort and protection of the grantor, which was plainly the object of the conveyance. 3. That the debt was not sufficiently proved, no consideration for the note being shown, and the award not being evidence against the defendant. 4. That the acceptance of the sealed award extinguished the original debt of the grantor and substituted a personal debt against the grantee: 2 Johns. Cas. 185; 6 Co. 44, l; Yelv. 38.

By Court, WOODWORTH, J. It appears to me that the material question to be considered in this case is, whether, in order to constitute a forfeiture, there must be both a refusal to pay the debts, and proof that the grantor was put to costs, trouble, or expense. The remaining questions are not attended with difficulty. In the first place, here was a debt claimed to be due from the grantor, which was disputed and payment refused. It can not be the fair construction of the covenant to deny the right of questioning the justice of the demand; consequently, the grantee had a right to insist that the demand be established. The parties selected the forum, and submitted to arbitrators. They adjudged the note to be a valid existing demand to the amount of six hundred and fifty dollars. After this was done, the grantee, according to the plain intent of the covenant, ought to have paid; for it was no longer competent to deny the validity of the debt. It was not pretended that payment was then,

or at any subsequent period, made. If this had been relied on, it was the duty of the grantee, or those who represented him, to have established the fact; but they have not done so. Here, then, so far as depended on a refusal or neglect to pay, the condition was broken. The lessor had, then, his election, either to insist on a forfeiture, provided non-payment merely was a sufficient ground, or to waive that remedy until an attempt was made to compel payment against the grantee by process of law, founded on the award. The latter was elected, and judgment recovered. No execution appears to have been issued. Why there were no further proceedings after judgment is not stated; nor is it material; for the neglect or refusal to pay, which existed at the time the award was made, continued when the judgment was rendered. The lessor, then, elected to pursue the other remedy, which is the present action. The grantee of the father having conveyed to the defendant, the suit is necessarily against him. If enough has been shown to entitle the lessor to recover, had the first grantee continued in possession, it is sufficient as against the defendant. He succeeded to the rights of his grantor, and no more. He represents him, and, for the purpose of this suit, stands in his place. In law, there is a privity of estate between them, and if there has been a forfeiture, it can not be defeated by a transmission of the title from one to the other. This was an estate upon condition. It can not be urged that it is even a hard case against the defendant, for he purchased with full knowledge of the condition; or, if not, it behooved him to inquire and examine the title before he purchased. Neither is there any doubt that on a covenant for the grantor to enter for condition broken, his heir, after the death of his ancestor, may avail himself of the covenant, although not expressly named. The doctrine is laid down in *Cruise, tit. Estate on Con., c. 1, sec. 17*; *Bacon, tit. Con. E.*

Having thus disposed of the minor questions, I will briefly consider the legal effect and operation of the covenant inserted in the deed. It will be perceived that according to the view taken, there has been a neglect or refusal to pay, and consequently, the question is narrowed down to this: whether it was also necessary to have shown the further fact that the grantor has been put to costs, trouble, or expense. If this be indispensable, there has been no forfeiture; for it is not alleged that a demand of any kind was ever made on the father. In courts of law it is a well-settled rule, in the construction of covenants of this description, to lean against that interpretation

which creates a forfeiture, if admissible from the words of the instrument. To give effect to this rule, the whole instrument must be considered as well as the particular clause relied on. On looking at the deed, it is evident the grantor intended that the grantee should hold the estate, if he paid the debts, and supported the grantor in the manner stipulated. On the supposition that the word "and" is to be understood as a copulative, and not a disjunctive, then it follows that in addition to the neglect or refusal to pay, the grantor must have been put to costs, trouble, and expense. This part of the condition was probably inserted to guard against the anxiety and vexation that a lawsuit might occasion to a person enfeebled by age and infirmities. If it be so, this part seems to apply to the grantor personally, and for his protection merely, and therefore ceased to operate after his death. His representatives do not appear to be within its provisions; that is, it can not be construed so as to require that they also should be put to costs, before the question of forfeiture can arise. If, then, after the death of the grantor, this clause no longer formed a part of the condition, what is its effect as to the residue? Is the residue of the condition of no avail, so that the grantee holds the estate absolutely, and nothing remains but a covenant to pay the debts? This interpretation would annul what, to say the least, was declared to be a part of the condition upon which the estate was to depend.

I incline to the opinion that in order to give effect to the whole, the construction is this, that to create a forfeiture during the life of the grantor, two contingencies must happen: 1. There must be a neglect or refusal to pay; and, 2. The grantor must be put to costs. After the death of the grantor, the latter event becoming impossible, the former condition alone remained; and consequently, on its being shown that the grantee neglected or refused to pay, the heirs of the grantor were entitled to enter. During the life of the grantor, it will be admitted that one of the contingencies singly would give no right of action, both must concur. From this view of the subject, it follows that as the condition guards against costs, and at the death of the grantor the other only remained in force, and there being a breach as to that, the plaintiff is entitled to recover.

But if I am in error as to the construction given, then the question arises, whether the word "and" is not used in the sense of "or," thus putting the forfeiture on either of these

grounds, viz., refusal to pay, or being put to costs, or in not affording a maintenance. It is well settled at the present day, although for a long time a *verato questio* in England, that the grammatical sense is not to be adhered to, either in a will or deed, where a contrary intent is apparent. The case of *Jackson v. Blaushan*, 6 Johns. 54 [5 Am. Dec. 188], where the authorities are reviewed, seems to be decisive on this point. The case arose on a will, but the authorities cited show that the principle applies equally to deeds. In *Wright v. Kemp*, 3 T. R. 470, the question came up on a surrender of copyhold premises. Lord Kenyon observed that in deeds certain legal phrases must be used to create certain estates, but beyond that he would say, with Lord Hardwicke, that there is no magic in particular words, further than as they show the intention of the parties. Ashurst, justice, says: "We must collect the intention of the parties in deeds as well as in wills, to give effect to which the word 'or' may in both cases be equally construed into 'and.'" There being, then, no doubt that the word "and" is not confined to the grammatical sense, but may be read as "or," so as to put the right of entry in the disjunctive, it only remains to consider whether the plain intent of the grantor was not that it should be so considered. I think this is manifest from the whole instrument. The recital shows the moving cause, that the debts should be honestly paid, and the grantor maintained. To enable the grantee to do this, the grantor parts with his whole estate upon condition; or, in other words, he was willing the grantee should enjoy, provided he would pay the debts, and maintain him. Is it not evident that the grantor intended to secure this object with absolute certainty? And if so, that intent might be defeated by following the grammatical sense.

Suppose a creditor, holding a promissory note against the grantor, given five years before the execution of the deed; he reposes in confidence until after six years had elapsed and then calls on the grantor, who, on request, refuses to pay. The creditor concludes not to prosecute, and his debt remains indefinitely unpaid. According to the doctrine contended for, here would be no forfeiture, and yet it can not be doubted that it never was the intention in such a case that the grantor should not be at liberty to enter for condition broken. Suppose, further, that there were a number of debts known to the grantee and admitted as valid; they apply for payment; it is refused, and yet they omit to prosecute for years; did the grantor imagine that, in such an event, there would be no forfeiture? If so,

provided there were no costs incurred, he would be obliged to see his creditors unpaid, and yet without the power to resume his estate; and that, too, notwithstanding the consideration was expressly that the grantee should pay. Not satisfied to rely on a covenant of the grantee to pay, he proceeds to convey the estate upon condition. It cannot reasonably be supposed that this primary object was intended to be impaired, by annexing the unimportant fact that costs must also accrue, but rather, that so particular and zealous was he to insure speedy justice to his creditors, and save himself from all disquietude on the subject, he adds a further condition, that no costs or expense be made. This, I understand, on a fair construction of the deed, to be of itself sufficient, and consequently subjecting the estate to forfeiture, on the breach of either condition.

In this view of the subject, the plaintiff is entitled to judgment.

THE FOREGOING DECISION IS RECOGNIZED AS AUTHORITY, on the following points, in the New York courts: That repugnant words in a covenant of warranty may be rejected as surplusage: *Sanders v. Betts*, 7 Wend. 289; that in the interpretation of deeds "and" may be construed "or," if such seems to be the intent of the whole instrument: *Long Island R. R. Co. v. Conklin*, 32 Barb. 385; that a condition or reservation in a deed in favor of a stranger is void: *Craig v. Wells*, 11 N. Y. 323; that on the death of a person his land descends to his heirs as tenants in common, and that the death severs their right to rent due upon a lease, and one of them may bring a separate action for the proportion due him, in *Cruger v. McLaury*, 41 N. Y. 223; that where there is a grant in fee, on condition subsequent, no one but the grantor or his heirs can re-enter for breach of the condition, and that a conveyance by the grantor before or after condition broken carries no right of re-entry, but that it is otherwise as to leases in fee, for life, or for years, reserving rent: *Underhill v. Saratoga, etc., R. R. Co.*, 20 Barb. 463; that statutes giving a right of appeal are to be liberally construed in furtherance of justice: *Pearson v. Lovejoy*, 35 How. Pr. 196; S. C., 53 Barb. 410.

JACKSON v. VICKORY.

[1 WENDELL, 408.]

CERTIFICATE OF THE PROOF OF A DEED by a subscribing witness, which states that the identity of such witness was proved to the satisfaction of the certifying officer by a witness who is named, without saying that the latter witness was known to the officer, is sufficient under the statute.

PROOF OF A WILL BY ONE OF THE ATTESTING WITNESSES is sufficient, if he can testify to a compliance with all the requirements of the statute as to the execution, acknowledgment, and attestation.

IF THE WITNESS CAN TESTIFY ONLY TO HIS OWN PART in the transaction in such a case, the other witnesses must be produced, if living and with-

in the jurisdiction of the court, and if dead, or beyond the jurisdiction, their handwriting and that of the testator should be proved.

PROOF BY ONE WITNESS INSUFFICIENT, WHEN.—When the witness who is produced can not remember whether or not the other witnesses subscribed their names in the presence of the testator, but presumes that they did so, as he would not have subscribed as a witness if the law had not been complied with, and the other witnesses are living and within the state, the proof is insufficient because it presents secondary evidence of a fact of which better evidence is within the party's reach.

CONSTRUCTION OF RESERVATION IN DEED.—Where a conveyance reserves two hundred acres, "to be taken off in a convenient, compact form from the southwest corner" of a tract, the land should be taken in a square, unless peculiarly inconvenient from the situation of the land, and should be bounded by the south and west boundaries of the larger tract.

EJECTMENT for the recovery of about forty acres of land within the L'Hommedieu patent. The plaintiff offered in evidence a deed from L'Hommedieu to Phillips and Roe, dated December 26, 1792, with the certificate of a commissioner of deeds setting forth the proof of said deed by one of the subscribing witnesses who appeared before him, and as to whom it was stated in the certificate that he was proved to the satisfaction of the commissioner, by the oath of one King, to be the same person who subscribed the deed as a witness. The defendant objected to the sufficiency of the certificate, because it did not state that the witness, King, who identified the subscribing witness, was known to the commissioner, but the objection was overruled. The plaintiff then proved a conveyance from Roe to Timothy Treadwell Smith, and offered in evidence the will of the said Smith, dated May 20, 1803, devising the premises to his brother, Elias Smith. One of the witnesses to the will was called, and testified that he signed his name as a witness to the will; that he was well acquainted with the testator and the other subscribing witnesses; that he knew the handwriting of the said witnesses, and had no doubt that their signatures to the will were in their handwriting; that the testator was of sound mind when he executed the will; that he could not remember particularly whether or not the other witnesses subscribed their names as such in the testator's presence, but presumed that they all did so, as he would not have subscribed his name as a witness if all the requisites of the law had not been complied with; that his opinion was strengthened by the fact that the will purported to have been executed in the presence of the witnesses who subscribed their names thereto as witnesses at the testator's request and in his presence and that of the witnesses; and that the other witnesses were living and within the state. The other

witnesses were not called. The defendant objected to the sufficiency of the proof, but the objection was overruled. The plaintiff then proved a conveyance from Elias Smith to the lessor of the plaintiff of the entire tract contained in the L'Hommedieu patent, excepting a certain two hundred acres previously conveyed to one Oliver Stevens. The defendant produced in evidence a conveyance from Timothy Treadwell Smith to Oliver Stevens of two hundred acres in said patent, and deduced title from Stevens to himself. The other facts are sufficiently stated in the opinion. The main question was, whether or not the forty acres now in controversy, and of which the defendant was proved to be in possession, was included in the said two hundred acres. Verdict for the plaintiff, subject to the opinion of the court.

B. Davis Noxon, for the plaintiff, as to the sufficiency of proof of the deed to Phillips and Roe, cited *Jackson v. Harrow*, 11 Johns. 434; and as to the sufficiency of the proof of the will of Timothy Treadwell Smith, he cited 19 Johns. 386 [*Jackson v. Le Grange*, 10 Am. Dec. 237].

J. R. Lawrence, for the defendant, as to the sufficiency of the proof of the will in question, also cited *Jackson v. Le Grange*, 19 Johns. 386 [10 Am. Dec. 237], and *Dan v. Brown*, 4 Cow. 290 [15 Am. Dec. 395].

By Court, SUTHERLAND, J. The deed of the twenty-sixth of December, 1792, from L'Hommedieu to Phillips and Roe, was sufficiently proved to entitle it to be read in evidence. The objection was, that the commissioner before whom the proof of the deed was taken, did not state in his certificate that he knew the witness, King, who proved the identity of De Peyster, the witness to the deed, who proved its due execution. 1 R. L. 369. A deed may either be acknowledged by the party or parties executing the same, or proved by one or more of the subscribing witnesses. When acknowledged, the statute requires that the officer taking the same shall know, or have satisfactory evidence that the person making such acknowledgment is the person described in, and who executed the deed. When proved by the subscribing witness, the officer must know the person making such proof, or have satisfactory evidence that he is a subscribing witness to such deed. But the statute does not prescribe the evidence which alone shall be satisfactory; it leaves that to the discretion of the officer, only requiring that he shall set forth in his certificate that witnesses were examined, and the

substance of their evidence. In *Jackson, ex dem. Wood, v. Harrow*. 11 Johns. 434, it is taken for granted that a certificate in this form would be sufficient.

The next inquiry is, whether the will of Timothy Treadwell Smith was sufficiently proved. It is sufficient to produce one of the subscribing witnesses to a will, if he can prove its perfect execution; that is, that the testator signed it in the presence of himself and two other witnesses, or that he acknowledged his signing to each of them, and that each of the witnesses subscribed in his presence. But if the witness who is produced can only testify to his own share in the transaction, the other witnesses, if living, and within the jurisdiction of the court, ought to be called. If they are dead, or beyond the jurisdiction of the court, then their handwriting, and the handwriting of the testator should also be proved. The jury will, from such evidence, be authorized in inferring that all the requirements of the statute have been complied with: 1 Phil. Ev. 439, 440; 2 Com. 530; 2 Str. 1109; Willis' R. 1; *Jackson v. Le Grange*, 19 Johns. 386 [10 Am. Dec. 237;] *Dan v. Brown*, 4 Cow. 483 [15 Am. Dec. 395]; *Jackson v. Luquere*, 5 Id. 221.

In *Jackson v. Le Grange* [10 Am. Dec. 237], the witness produced recollected none of the circumstances attending the execution of the will; he had no recollection of the testator, or of seeing the will executed; but he testified that his name subscribed to the will as a witness was his proper handwriting, and that he knew the handwriting of Jeremiah Lansing, another witness, who was dead. The third witness was proved to have been, at the time of the trial, living within the State. It was held that Wendell, the third witness, ought to have been called, inasmuch as the witness who was examined did not prove the facts essentially necessary to the valid execution of the will; and it is said that if Wendell had been produced, he might either have proved or disproved these facts. But if his recollection should also have failed him, as well as the other witness, still, if he could have proved his signature, that, together with the proof of the signature of the testator, would have been sufficient.

In *Dan v. Brown* [15 Am. Dec. 395], the will was lost, and could not be produced. Two of the witnesses to the will were called, and Mr. Marcy, one of the witnesses, testified that he drew the will, and that the testator executed it in the presence of three witnesses, and those three witnesses signed their names to the will in the presence of the testator and of each other; that he and Mr. Mallory were two of the witnesses, but who the

third witness was he could not recollect; but he had no doubt, from the circumstance of the testator depending upon him to see that the will was properly executed, that the third witness was a credible one. Here the perfect execution of the will was proved; a strict compliance with all the formalities required by the statute was positively sworn to by Mr. Marcy, and if the third witness had been living and within the jurisdiction of the court, it would not have been necessary to have produced him. But, at all events, it was the very best evidence which the nature and circumstances of the case admitted of.

In the case a bar, the evidence is certainly not so strong. The witness produced could not remember whether the other witnesses subscribed their names in the presence of the testator or not. Here, then, is a fact essential to the valid execution of the will, which is not proved. The witness, it is true, observes that he presumes all the witnesses signed their names in the presence of the testator, as he would not have subscribed his name unless the requisites of the law had been complied with. He does not even swear that he signed in the presence of the testator. But he presumes they all, himself as well as the others, so signed, because he would not have signed unless the requisites of the law had been complied with. It will be perceived that this amounts to nothing more than the proof of his own signature, and of the signatures of the other witnesses, and of the testator, by one of the witnesses; and from the fact of his own signature he presumes or infers everything else that he states. This undoubtedly would be sufficient, if the other witnesses were dead, to authorize a jury to believe that all the formalities of the statute had been complied with.

The law, as Judge Spencer remarks, in *Jackson v. Le Grange* [10 Am. Dec. 395], does not require impossibilities; and, therefore, where the will has been executed for a long time, it is not ordinarily to be expected that the witnesses will be able to remember all the material facts. But here only one of the witnesses has been produced; and although he does not recollect all the material facts, it does not follow that the others would not; and we have no right to indulge in presumptions as to them, when they are within the reach of the court, and can be called upon to testify. It is resorting to secondary evidence, when that of a higher order is within the reach of the party. If one of the witnesses will swear that he and the other two subscribed the will in the presence of the testator, that is evidence of as high a grade as though the other witnesses had been produced

and testified to the same fact; and the law has properly determined that it is sufficient. But unless the witness produced can prove a valid execution of the will, the other witnesses, if living, and within the jurisdiction of the court, ought to be called. I am of opinion, therefore, that the will in this case was improperly admitted in evidence.

The question of adverse possession does not strictly arise in this case. Timothy Treadwell Smith is the common source of title to both parties. The plaintiff claims under a deed from Elias Smith, the devisee of T. Treadwell Smith, bearing date the twenty-second day of August, 1825. The defendant claims under a deed from Timothy Treadwell Smith to Oliver Stevens, dated December 19, 1800, for two hundred acres of land. The conveyance to the plaintiff covers the whole of what is called the L'Hommedieu patent, containing two thousand two hundred acres, with the exception and reservation of two hundred acres, to be taken from the south-west corner of said tract, agreeably to the terms of the deed granted to Oliver Stevens, "the same being hereby expressly excepted and reserved by the said parties of the first part, and in no wise intended to be conveyed or in any manner affected by this conveyance." The grant to Stevens is first to be satisfied, and the residue of the patent belongs to the lessor. The first question, then, is as to the true location of the two hundred acres conveyed to Stevens. By the terms of the deed, "they are to be taken off in a convenient compact form from the south-west corner of the patent," etc. There can be no question that the south and west lines of the patent are to be the south and west boundaries of the two hundred acres; and I should be inclined to think that they ought to be located in a square, unless the situation of the land would render such location peculiarly inconvenient. It is conceded that the two hundred acres in this case are not in a square, and it is contended by the plaintiff that they do not extend to the west line of the patent by about ten rods.

Ebenezer Rice, a witness for the plaintiff, testified that he surveyed the L'Hommedieu tract, in 1825, according to the courses and distances given in the patent, and that he made the west line of the patent about ten rods west of the west line of Stevens' two hundred acres. He had been a practical surveyor about thirty years, and took great pains to survey accurately. He found no line of marked trees on the west line run by him, nor any marked object in the north-west corner. The contents of the tract, according to this survey, was two thousand one

hundred and nineteen acres, about eighty acres less than the patent given.

Benjamin Winch and Elnathan Botsford testified to the line according to the location of the defendant. The testimony of Winch amounts to nothing. He found a line of marked trees, and supposed that was the west line of the patent. He had also been at the south-east corner, and had traced the lines and found marked trees; but by whom these lines were marked, or whether they corresponded with the description in the patent, he did not pretend to know. Judge Wright gave him the courses and distances.

Botsford's testimony is equally vague. He assisted one Blanchard in running round the patent in 1805. They were employed by Stevens. They found marked trees and corners all around, but who had marked them he did not know. He never saw or knew either of the Smiths. Blanchard and he ran out the two hundred acres for Stevens.

Upon this testimony, it may be remarked that Rice, the plaintiff's witness, swears positively that his survey is according to the courses and distances in the patent, no monument or fixed object being mentioned in it. The defendant's witnesses merely followed certain lines of marked trees which they found, and which they believed to be the lines of the patent. But there is no evidence that the west line thus marked was run or marked by the direction of the patentee, or any one claiming under him, or had ever in any manner been recognized by them. I should therefore be inclined to the opinion that upon the evidence as it now stands, Rice's line must be considered the true one. It is not my intention, however, to express a decided opinion upon this point, as the cause is to be sent down for another trial, when the question will be open for further evidence. As to the actual occupancy of the forty acres in question, the weight of evidence, in my judgment, is, that there was no clearing or other improvement made on it until 1807. Leonard Fuller testifies that in 1808 there was a piece of wheat on a part of the forty acres, and the land on which it grew appeared to have been cleared the year before. This suit was commenced in February term, 1826, less than twenty years from the first actual occupancy. There are witnesses, it is true, who speak in general terms of its having been improved in part for twenty-three or twenty-four years; but this testimony wants the precision and accuracy which characterize the testimony of Fuller. Fuller also testified that in 1810, Smith, the former owner of the lot,

came there and told Stevens in express terms that he did not admit or consider that the two hundred acres had been located or surveyed in conformity to the deed, and they had a severe altercation respecting it. This disposes of the argument founded on the long acquiescence in the location, admitting it to have been erroneous. The questions will probably all of them receive further elucidation upon the new trial, which must be granted, on account of the improper admission of the will of Timothy Treadwell Smith in evidence.

New trial granted.

PROOF OF WILL BY ONE WITNESS.—See on this subject, *Welch v. Welch*, 15 Am. Dec. 127, and *Dan v. Brown*, Id. 400, and the notes thereto. The doctrine of the principal case on this point is approved in *Hunt v. Johnson*, 19 N. Y. 293; *Cornell v. Woolley*, 3 Keyes, 379, S. C., 4 Abb. Pr. N. S. 42; *Price v. Brown*, 1 Brad. 293; *Weir v. Fitzgerald*, 2 Id. 74; *Nichols v. Romaine*, 3 Abb. Pr. 126.

REED v. VAN OSTRAND.

[1 WENDELL, 424.]

GIVING A NEGOTIABLE NOTE IS NOT A PAYMENT OF MONEY between the maker and payee so as to support an action for money had and received on failure of the consideration.

UNLESS A NOTE IS RECEIVED AS PAYMENT in discharge of a liability of the party sought to be charged, the giving of such note is in no case equivalent to a payment of money.

GIVING ONE'S NOTE, IN DISCHARGE OF A THIRD PERSON'S DEBT to the payee, is equivalent to a payment of money to the use of such third person.

AUTHORITY TO EXECUTE A DEED must be given by deed.

TO CONVEY A CHATTEL INTEREST a seal is unnecessary.

ASSIGNMENT OF AN INVENTOR'S INTEREST IN HIS INVENTION need not be under seal, and authority to execute such an assignment may be proved by parol.

REPRESENTATIONS NOT INCLUDED IN WRITTEN CONTRACT.—Where a contract for the sale of a chattel is consummated by a written conveyance, previous representations amounting to a warranty, which are not inserted in the contract, can not be proved by parol in an action of assumpsit on the alleged warranty.

CONTRACT CONSUMMATED BY WRITING is presumed to contain the whole agreement.

ASSUMPSIT to recover six hundred dollars alleged to have been paid by the plaintiffs to the defendants for the purchase of the exclusive right of constructing and selling within Jefferson county a certain threshing machine, invented by one Hyde, on the ground that the machine was worthless. The declaration

contained certain special counts, the substance of which is sufficiently stated in the opinion, together with a count alleging that at the time of the purchase the defendants represented that they had full power to sell and convey, etc., and that the plaintiffs thereupon paid the six hundred dollars, but that in fact the defendants were not authorized to sell and convey, and had neglected to make a good and sufficient conveyance, and also the common count for money had and received, lent and advanced. On the trial at the circuit it appeared that the plaintiffs purchased of the defendants the exclusive right of constructing and vending said threshing machine as alleged, and gave the defendants therefor their three negotiable notes for two hundred dollars, each payable on certain future days, and that none of the notes were negotiated or paid before the action was brought. The plaintiffs produced in evidence a conveyance from the defendants of the right in question. The conveyance contained no covenants, and was signed and sealed as follows: "William P. Morse, L. S., Silas Ames, L. S., and W. P. Morse, L. S." It appeared from the testimony of a witness that at the execution of the conveyance the said Ames was not present, but the defendants, Van Ostrand and Morse, who were present, said they were authorized to sign for him and for each other, and that Van Ostrand thereupon signed the names of Morse and Ames; but it being suggested that Morse, being present, could sign for himself, he did so sign, so that his name was signed twice, while that of the defendant Van Ostrand was not signed at all. Afterwards some objection was made to the deed, and Morse said that if it was not right he would make it right on the return of Van Ostrand, who was absent. At the time of the conveyance and the giving of the notes, a specification of the invention was exhibited, stating: "The size of the machine may be varied in proportion to the power intended to propel it; for one adapted to the strength of an ordinary man the following are the dimensions," etc.; and, "the machinery is all put in motion by hand, turned by a crank or a pin in one of the principal wheels, by the strength of one man," etc. The plaintiffs further proved that during the month when the sale was made the defendants were seen selling rights in said machine in Jefferson county, and recommending it as a useful machine.

On this state of the evidence the defendants moved for a nonsuit, because: 1. The conveyance being under seal, assumpsit would not lie, and parol evidence of the contract was inadmis-

sible; 2. There was no proof of a warranty or of money paid; 3. The acceptance of the conveyance was a waiver of irregularities in its execution until the plaintiffs were disturbed in their right; 4. Fraud was not proved; 5. If there was fraud or failure of consideration, as there was no money paid before action brought, *case* and not *assumpsit* was the remedy; 6. The giving of the notes did not support the averment of money paid. The motion was overruled, the judge holding that the giving of the notes was equivalent to the payment of money, and that the transfer being irregular, inoperative, and invalid, the transaction was a nullity, the consideration had failed, and the plaintiffs were entitled to recover on the money counts unless the notes were given up to be canceled.

To compel the defendants to show authority from Ames to execute the conveyance, the plaintiffs proved that he was in court, when the defendants called him as a witness, and asked whether or not he had given such authority, which interrogatory was excluded on objection by the plaintiffs on the ground that an authority under seal must be proved. The plaintiffs further proved sundry representations of the defendants before the bargain was completed, that the machine was a good one and would thresh well, etc., and also a subsequent acknowledgment on their part that they had warranted the machine. They further showed by several witnesses that the machine was in fact worthless and could not be made to work by the strength of one man when fed with grain. The defendants, on the other hand, introduced evidence tending to show that a machine constructed according to the specification would work well by the strength of an ordinary man; and, also, that Morse had told the plaintiffs before the action that if the deed was not right he and Van Ostrand would make it so or would execute a new one. The instructions of the judge were in favor of the plaintiffs. Verdict for the plaintiffs for six hundred dollars, which the defendants now moved to set aside.

B. Davis Noxon, for the defendants, urged the same grounds relied on for nonsuit.

S. Beardsley, for the plaintiffs, contended: 1. That the conveyance was a nullity because it was signed by only one of the grantors, and the right could only be transferred by grant: 3 Co Lit. 9 b, 49 a, 121 b, 169 a, 172 a; 4 Johns. 81 [*Thompson v. Gregory*, 4 Am. Dec. 255]; 2. That the deed, if well executed, conveyed nothing, because the patent right not being

useful, was void: 1 *Mason*, 182, 302; 3. That under the circumstances of this case the giving of the notes was equivalent to a payment of money: *Ainslie v. Wilson*, 7 Cow. 662 [17 Am. Dec. 532]; *Clark v. Pinney*, 6 Id. 297; *Cumming v. Hackley*, 8 Johns. 202; *Beardsley v. Root*, 11 Id. 464 [6 Am. Dec. 386]; 4. That the representations made by the defendants amounted to a warranty: *Chapman v. Murch*, 19 Johns. 290 [10 Am. Dec. 237].

By Court, SAVAGE, C. J. The questions which I propose to consider are: 1. Was the giving the notes equivalent to the payment of money? 2. Was there fraud in the transaction of selling the patent right? and, 3. Was the action sustained upon either of the special counts?

1. There are cases, no doubt, where the giving a negotiable promissory note is equivalent to the payment of money. Thus, where a surety gave his own note, which was received in satisfaction of the debt of the principal, the surety recovered the amount of the note, as so much money paid for the use of the principal: *Barclay v. Gooch*, 2 Esp. 571, recognized as good law in *Cumming v. Hackley*, 8 Johns. 206.

So, where the surety gave his note in satisfaction of a judgment rendered against him and the principal, the giving the note was considered as payment of so much money, and the surety recovered as for money paid: *Witherby v. Mann*, 11 Johns. 518. See, also, 3 Mass. 403 [*Floyd v. Day*, 3 Am. Dec. 171]. So where an agent discharged a debt due to his principal, by paying a debt of his own with it, the agent was held liable to his principal for the amount thus appropriated, as money had and received to his use: *Beardsley v. Root*, 11 Johns. 464 [6 Am. Dec. 386].

It has also been held that the taking a note of a third person by the sheriff upon an execution, by the consent of the plaintiff, as payment of the execution, is equivalent to the payment of money: *Clark v. Pinney*, 6 Cow. 301; *Armstrong v. Garrow*, 6 Id. 470, 471. But no case has been cited to show that the giving a negotiable promissory note is the payment of money by the maker to the payee. In no case has the giving a note been held equivalent to the payment of money, unless the note was received as such, in payment or discharge of a debt, or liability of the party sought to be charged.

The conveyance of land received in discharge of a money debt, is equivalent in certain cases to payment in money: 7 Cow. 668 [*Ainslie v. Wilson*, 17 Am. Dec. 532].

Had the notes in question been given to a third person, in payment and discharge of a debt due by the defendants to such third person, then the case would have come within previous decisions. Or had the note, due on the first of January, 1827, been transferred and paid, or even transferred to an innocent indorsee before suit brought, there would be a strong analogy to decided cases. But I can not find that the giving a note ever has been considered, as between maker and payee, the payment of money by the former to the latter.

If such a note should be given without consideration, there is a remedy. As between payee and maker, the want of consideration is a good defense. If the maker is apprehensive that such a note given by him will be negotiated, it may procure an injunction from chancery in a proper case, restraining the transfer of the note. Or when such a note shall be paid to an innocent holder, the amount may be recovered back from the party who improperly obtained the note. But in my judgment the mere giving a note can not be considered payment of the very money for which such note is given as a security, so as to justify a recovery of it by the maker against the payee. If I am correct in this position, there has been no money paid previous to the commencement of this suit, and therefore the plaintiffs can not recover upon the common count.

2. Nor can I see that fraud has been proved. Fraud is never to be presumed, but must be shown by proof. The circumstances attending the execution of the deed of transfer look suspicious; but when an attempt was made at explanation, by showing Ames' authority to his copartners to sign his name, it was required that he should be called; and when he was called, it was objected that there should be a written authority, under seal, produced; and so the judge decided. An authority to execute a deed must be given by deed, to render the deed valid: Com. Dig., Attorney, C, 5; 5 Binn. 615. But the question before the court and jury was as to the fraudulent representations or conduct of the defendants. It had been already proved that the defendants had offered to have the conveyance executed in a manner that should be satisfactory. It is worthy of consideration, also, that the property to be conveyed was only a chattel interest; that to convey such an interest a seal is not necessary; and that the fourth section of the act of congress of February 21, 1793, which authorizes an inventor to assign his interest in his invention, does not require the assignment to be made under

seal. I am inclined to the opinion, therefore, that the testimony of Ames should have been received.

3. It becomes necessary, then, to inquire whether the plaintiffs have made out a case under either of their special counts. The first count states substantially that the defendants assumed and promised that the machine was a useful improvement; and that it was not, in fact, a useful improvement. This was fully proved; but the question at the trial was whether parol proof could be given of what was said previous to the execution of the deed. On that point, it seems to me that this is a case where the whole contract must be presumed to be reduced to writing. The instrument, in truth, does not contain anything about the contract except a bare assignment of the patent right. It contains no warranty that the machine was a useful improvement. Suppose one man sells to another a horse; he represents him sound, gentle, and useful; but a bill of sale is given in writing which contains a bare transfer of the animal, without any warranty or engagement as to the soundness or good qualities of the horse; could the purchaser, in that case, go back and prove the representations and assertions made before the execution of the bill of sale? I think not. Where a contract has been consummated by writing, the presumption is that the writing contains the whole contract. If I am correct in this, then the plaintiffs have failed to prove the warranty. On the main question, whether the improvement was a valuable one, I am of opinion that the evidence was in favor of the plaintiffs. The machine they purchased was to be worked by hand, and they proved that a machine made according to the specification was worthless. This was not contradicted by proving that a horse-power machine, under the same patent, was a valuable improvement; but this evidence was irregularly before the jury, a warranty not being properly proved.

I am, therefore, of opinion that a new trial should be granted.

EVIDENCE OF AN ORAL WARRANTY IS INADMISSIBLE where the contract of sale has been reduced to writing; *Smith v. Williams*, 4 Am. Dec. 564. As to the admissibility of parol evidence, generally, to explain or enlarge a written contract, see cases in the American Decisions cited in the note to *Raymond v. Roberts*, 16 Am. Dec. 698. The doctrine of the principal case on this subject is referred to with approval in *Silliman v. Tuttle*, 45 Barb. 175, and *Filkins v. Whyland*, 24 N. Y. 343. So in *Miller v. Lockwood*, 32 N. Y. 307, per Potter, J., dissenting, holding that an instrument giving the details of a contract is to be presumed complete.

PAYMENT BY NOTE.—See, on this point, the note to *Varner v. Nobleborough*, 11 Am. Dec. 53, and cases there cited. See, also, *Muldon v. Whitlock*,

13 Id. 533, and *Ainslie v. Wilson*, 17 Id. 532, and the note thereto. The decision in *Reed v. Van Ostrand*, with respect to this question, is cited with approval in *Lewis v. Loeze*, 3 Wend. 82; *Rodman v. Hedden*, 10 Id. 502, and *Colville v. Besly*, 2 Denio, 143. The principal case is also cited to the point that an authority to execute a deed must be given by deed, in *Blood v. Goodrich*, 9 Wend. 76.

BUCK v. AIKIN.

[1 WENDELL, 466.]

POSSESSION TO MAINTAIN TRESPASS.—The right to reduce a chattel into actual possession is sufficient to maintain trespass for taking it.

POSSESSION OF A PART OF A TRACT OF LAND without title can not be extended by construction to the part not in actual possession of the party, so as to enable him to reclaim timber cut thereon.

PURCHASER'S RIGHT AS TO TREES CUT BEFORE PURCHASE.—The purchaser of a lot can not reclaim trees cut and removed therefrom before his purchase.

PROPERTY IN A STRANGER IS NO DEFENSE IN TRESPASS *de bonis asportatis*, though it is otherwise in trover.

SHERIFF'S DEED IS INADMISSIBLE as evidence of title without proof of the judgment and execution.

TRESPASS for the taking and carrying away of certain saw logs. Verdict for the plaintiffs, under the direction of the judge, for two hundred and ten dollars, the value of the logs, and motion to set the verdict aside. The material facts are stated in the opinion.

Z. B. Shipherd, for the defendant.

S. Stevens, for the plaintiffs.

By Court, SUTHERLAND, J. The plaintiffs showed a sufficient possession of the property to enable them to maintain the action. The logs were actually received and marked by the agent of the plaintiffs, and left upon the bank of the river Au Sable, upon land belonging to or claimed by the Peru Iron Company. The plaintiffs had such a right to the logs, *prima facie*, as to be entitled to take them into their actual possession whenever they pleased; and this is sufficient to maintain the action: 8 Johns. 432; 13 Id. 141, 561.

The defendant entirely failed in his defense. The logs were cut on the north end of lot two hundred and ten, in Maule's patent, and the defendant proved a possession of a dwelling-house, and the working of an ore bed on the south end of the lot by himself and the Peru Iron Company, and contends that that gave him or the company, constructively, the possession of the

whole lot. In this he was mistaken. He showed no deed for the lot. His possession, therefore, was confined to the land actually occupied by him or the company, and can not be extended by construction to a single acre beyond it. The deed from the sheriff of Clinton county to Daniel Cady and to the defendant for lot number two hundred and ten was properly excluded by the judge. The one bore date in July, 1827, and the other in April, 1826. The logs were purchased by the plaintiffs' agent in the fall of 1825, or the winter of 1826; and having been removed from the lot, the subsequent sale of it would not entitle the purchaser to follow and retain them. Besides, as to the deed to Cady, it was inadmissible, because in trespass *de bonis asportatis*, the defendant can not show property in a stranger, though it is otherwise in trover: 11 Johns. 132, 529; 13 Id. 284.

The deeds were also inadmissible on the ground that the judgments and executions under which they purported to be given were not proved or given in evidence in any manner. The sum which the judge directed the jury to find had undoubtedly been proved to be the value of the logs taken.

The motion for a new trial must, therefore, be denied.

POSSESSION OF PART NOT EXTENDED TO WHOLE TRACT, WHEN.—See, on this point, *Hall v. Powell*, 8 Am. Dec. 722; *Taylor v. Buckner*, 12 Id. 354, and note; *Riley v. Jameson*, 14 Id. 325, and note. See, also, approving the principal case: *Brown v. Majors*, 7 Wend. 496; *Judges v. People*, 18 Id. 85.

POSSESSION TO MAINTAIN TRESPASS.—This subject is discussed at length in the note to *Orser v. Storms*, 18 Am. Dec. 546. That bare possession is sufficient as against a wrong-doer is held, citing *Buck v. Aikin*, in *Butts v. Collins*, 13 Wend. 143. So, that constructive possession is sufficient, in *Ash v. Putnam*, 1 Hill, 306; *Cary v. Hotailing*, Id. 314; *Neff v. Thompson*, 3 Barb. 216. Title in a third person, with which the defendant has no connection, can not be shown by way of defense in trespass for taking a chattel: *Colton v. Jones*, 7 Rob. (N. Y.) 173; *King v. Orser*, 4 Bos. 436; *Kissam v. Roberts*, 6 Id. 163, all citing *Buck v. Aikin*.

CASES
IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS AND THE
CORRECTION OF ERRORS
OF
NEW YORK.

MURRAY v. BLATCHFORD.

[1 WENDELL, 583.]

RELEASE OF A DEBT BY TWO ADMINISTRATORS, against the will of a third, is valid.

EXECUTORS AND ADMINISTRATORS STAND ON THE SAME GROUND, with respect to their responsibilities, rights, and powers.

DOCTRINE OF LIS PENDENS IS, that whoever purchases the subject-matter of a suit, *pendente lite*, takes subject to the decree or judgment to be rendered therein, the pendency of the suit being *per se* notice to all the world.

PENDENCY OF A SUIT IN CHANCERY COMMENCES with the service of the subpoena.

NOTICE OF AN INTERLOCUTORY PROCEEDING DOES NOT OPERATE AS LIS PENDENS; as where one administrator gives notice to the two others of an intended application for the appointment of a receiver, on the ground of the insolvency and advanced age of one of the administrators, and, notwithstanding such notice, the other administrators have power to compromise or release a debt due the estate.

UNCONTRADICTED AND RESPONSIVE ANSWER TO A BILL CHARGING FRAUD, denying such fraud, will be taken as true.

WHERE ONE COLLUDES WITH AN EXECUTOR to produce a *devastavit*, parties interested in the estate may pursue property into his hands.

COLLUSION IS ANY INTERMEDDLING WITH THE EXECUTOR or the assets, whereby the executor is guilty of a violation of duty.

WHERE ONE THIRD OF THE DISTRIBUTUTES OPPOSE A RELEASE or compromise of a debt by the administrators, but no fraud or collusion is shown, such release will not be set aside.

APPEAL from the court of chancery. The bill was filed in the court below by Blatchford and wife, and Bliss and wife, the said wives being two of the six heirs at law of John P. Mum-

ford, deceased, to set aside a release executed by Mary I. Mumford and John I. Mumford, to John B. Murray, of a debt due from him to the estate of the said deceased, on the ground that the same was procured by fraud and by taking advantage of the necessities of the said Mary I. and John I. Mumford; and the said Murray, and the administrators, and the remaining heirs and distributees were made defendants. The defendants, in their separate answers, admitted the execution of the release as charged, but denied all fraud, and averred that the same was fairly made. From the bill and answers, it appeared that John P. Mumford, before his death, had instituted a suit for an account against John B. Murray, they having previously been partners in business as merchants, but the partnership having been dissolved. This suit was pending at Mumford's death, and was revived in favor of his administrators, who in January, 1822, obtained a decretal order against Murray for an account. Murray appealed to the court of errors, but the appeal was dismissed for want of prosecution. Murray then obtained a rehearing in the court of chancery, upon which the former decretal order was confirmed, when he again appealed, and the appeal was again dismissed for want of prosecution. An account was then taken by a master, who reported ninety thousand dollars due the complainants from Murray, which report was confirmed January 26, 1825. Before the entry of the order of confirmation, however, Dunscomb, one of Mumford's administrators, gave notice to the other two administrators, Mary I. and John I. Mumford, that he intended to apply to the chancellor for the appointment of a receiver and the suspension of the powers of the administrators, setting forth in his verified petition, copies of which were served with the notice, that John I. Mumford was insolvent, and that Mary I. Mumford was of advanced age and infirm health, and that there were differences between her and the petitioner, which prevented their acting together in the administration. On request of the other administrators, on January 20, Dunscomb postponed his application until January 31, 1825. Mary I. Mumford and John I. Mumford, however, on January 20, without the assent of Dunscomb, compromised the suit with Murray, on the payment of thirty thousand dollars, and executed the release, which this suit was brought to set aside. The other material facts are stated in the opinion of the chief justice.

Judge Emott, sitting for the chancellor, decreed that the release was inoperative with respect to the present complain-

ants, but binding upon parties and privies; that two sixths of twenty thousand dollars, being the proportion of the money received on the compromise, which the complainants would have been entitled to if they had assented to it, should be paid back to Murray, and that the complainants should have leave to prosecute to a final decree the original suit against Murray, for the purpose of ascertaining the amount due from him, in order that their interest might be liquidated. It is not deemed necessary to insert Judge Emott's opinion, as his conclusions were the same as those of the chief justice on all the questions presented, with one exception, which is noticed by the chief justice. Murray appealed from the decree declaring the release invalid, and also claimed that if the release was inoperative he ought to receive back the whole amount paid on the compromise. The complainants also filed a cross-appeal from that part of the decree directing two sixths of twenty thousand dollars to be paid back to Murray. The defendant's appeal was first brought to a hearing.

R. Sedgwick and S. A. Talcott, attorney-general, for the appellant, claimed: 1. That two administrators, without the assent of the third, could release a debt due their intestate, and that the powers, rights, duties, and responsibilities of executors and administrators were the same, citing and commenting on 1 Com. Dig. 342; *Jacomb v. Harwood*, 2 Ves. 265; Toller, 408; *Douglass v. Satterlee*, 11 Johns. 22; 2 Vern. 514; Rast. 560; 1 Atk. 460; *Willand v. Fenn*, 2 Wheat. Sel. 574, n. 8; Shep. Touch. 484, 5; *Pierson v. Hooker*, 3 Johns. 70 [3 Am. Dec. 467], a case of partnership: 1 Hayw. 104; Gwillim's note to Bac. Abr., tit. Ex'r and Adm'r, 395; *Bacon v. Bell*, Cottrell's Trans. of High Court of Chancery, 87; 6 Ves. 748; 2. That the petition for a receiver did not suspend the power of the administrators any more than in the case of a trustee against whom an injunction and receiver are prayed, and that notice of an intended or preliminary proceeding could not operate as *lis pendens*: *Green v. Slayter*, 4 Johns. Ch. 38; 3. That there was no evidence of fraud in the case, which must always depend upon the circumstances, and to constitute which there must exist an intent to do some injury to the person, property, or character of another, citing *Bissell v. Hopkins*, 3 Cow. 166 [15 Am. Dec. 259]; 7 Taunt. 421.

H. W. Warner and D. B. Ogden, for the respondents, maintained: 1. That the release was bad, because not concurred in

by one of the administrators, the case of administrators being different from that of executors in this respect, and administration being in the nature of an office, in the execution of which all must join, citing *Bac. Use of the Law*, tit. Property by letters of administration; *Hudson v. Hudson*, 1 Atk. 460; 2 Bl. Com. 510; *Wood's Inst.* 335; *Toller's Law of Executors*, 187, 324; 1 *Vin. Abr.* 78, tit. Executors, D, 2; *Cas. t. Talb.* 127; 2 *Vern.* 514; 1 *Bridgman's Index*, pl. 21; 4 *Mass.* 636; 2. That the transaction respecting the release was unlawful also, because of the pendency of the application for a receiver, of which the administrators had notice; 3. That the release for less than the amount of the debt constituted a breach of trust and a *devastavit*: *Bac. Abr.*, tit. Ex'rs and Adm'rs, L, 431; 2 *Johns. Cas.* 376; 7 *Johns.* 404; 2 *Cow.* 808; for a compromise must be, not only *bona fide*, but beneficial: 3 *P. Wms.* 381; 2 *Munf.* 105 [*Clay v. Williams*, 5 *Am. Dec.* 453]; 9 *Mass.* 352; 4. That the release was void also for fraud both in fact and in law, citing and commenting upon *Chesterfield v. Jansen*, 2 *Ves.* 185.

SAVAGE, C. J. The complainants contended in the court of chancery that the release should be set aside on several grounds: 1. Because it was executed by only two of the administrators; 2. Because there was a *lis pendens*, in consequence of the notice of the application for the appointment of a receiver; 3. And principally because the transaction was fraudulent. Judge Emott, who sat for the chancellor, decided all these points in favor of the defendants, but held that this was a case in which the complainant ought not to be bound by the acts of the administrators; and, therefore, decreed that the release be set aside, so far as relates to the interests of the complainants, who represent one third part of the estate of John P. Mumford, deceased. From this decision, John B. Murray has appealed to this court; and the questions to be decided are the same as in the court of chancery.

1. Was it competent for two administrators, against the will of the third, to execute a valid release?

The law as to the power of executors seems never to have been questioned. "If a man appoints several executors, they are esteemed in law but as one person representing the testator, and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all; for they have a joint and entire authority:" 3 *Bac. Abr.*, Ex'rs and Adm'rs, D. The reason given for this rule by Lord Hardwicke

is that each executor is considered as entirely representing the testator: *Hudson v. Hudson*, 1 Atk. 460. Lord Hardwicke, however, considered that administrators have no such power; and the principal reason assigned for the difference is that the executor receives his power from the testator, and may perform many acts before probate of the will; but the administrator receives all his authority from the ordinary. Lord Hardwicke cites no authority but the opinion of Lord Bacon, 4 Elements of the Law, 83.

A similar dictum is found in 11 Vin. 73, citing Tothil, 264, 265. The same point is laid down by Blackstone, 2 Com. 510, and he relies on the case of *Hudson v. Hudson*. In that case, this point was not necessary to be adjudicated, as the cause was decided upon another point. The opinions of Lord Bacon and Lord Hardwicke are entitled to great respect, and in the English courts they have been so treated. The case of *Hudson v. Hudson* was decided in 1737. In 1751, in *Jacomb v. Harwood*, 2 Ves. 267, the same question was discussed by Sir John Strange, master of the rolls, when the case of *Hudson v. Hudson* was considered. Speaking of that case, he says it was said that in that case the lord chancellor had been of opinion, that one administrator could not release so as to bind the other; yet, when that case was more narrowly looked into, it appeared clearly that was applicable to the particular circumstances of the case. He then cites the case of *Willand v. Fenn*, in which there had been three arguments in the king's bench, and thereupon decided that one administrator stood on the same ground and foundation as one executor; and such was the decision of the master of the rolls. The case of *Jacomb v. Harwood* has never been overruled in England, but has been acquiesced in and considered as settling the point: Toller's Ex'r, 407, 408. And the same has been the understanding of the courts in this state: 11 Johns. 22. The difference heretofore supposed to exist between the powers of executors and administrators, in this respect, was said to be founded in the different sources from which their powers were derived; the one being by appointment of the testator, the other by the appointment of law. I apprehend there never was any reason for the supposed distinction. Their liabilities and responsibilities were ever the same, and their powers should be so; but if there was ground formerly for it, there surely is none under our statutes, which recognize both as possessing the same rights, and interest, and authority over the estate of the deceased.

2. The doctrine of *lis pendens* is this: That whoever purchases the subject-matter of a suit, *pendente lite*, takes his purchase subject to the decree or judgment which may be rendered in such suit, and the pendency of such suit is *per se* notice to all the world, and such pendency, when in chancery, commences with the service of the subpoena: 1 Johns. Ch. 576. I apprehend this doctrine is not applicable to this case. A suit is not considered to be pending within the rule until the service of process. In chancery no subpoena issues until bill filed; and the court is supposed, by awarding process, to have adjudged that the plaintiff had shown a *prima facie* case for relief. In this case, notice had been given by one of the administrators to the other two, that an application would be made for the appointment of a receiver, not because there had been any improper conduct in the administrators, or because anything of that kind was alleged, but because one was said to be old, and the other insolvent, and they had given security in only forty thousand dollars. This notice can never operate as a *lis pendens*. It is a mere interlocutory proceeding in the suit already pending; and if this notice were to incapacitate the administrators from acting, it would be easy for a *cestui que trust*, by giving a similar notice, to prevent executors, or administrators, or trustees from ever doing anything, and there would be no safety in transacting business with them. A reference to the offices of any of the officers of the courts would give no information of any such *lis pendens*. Not even an *ex parte* adjudication of the matter gives sanction to the claim; but simply the mere assertion of a right to interfere by the person giving the notice. It is conceded in this case that the defendants had notice of the intended motion, and they acted in reference to such notice, and, it is presumed, with knowledge that such notice could have no possible effect upon any fair and equitable arrangement which they should make.

The main question in this case, I apprehend, is the question of fraud. The bill charges that the defendants acted fraudulently, in bad faith; and in relation to the defendant, Murray, several facts are charged as evidence of the fraud. Among these are: 1. Attempts to delay a decision in the cause, by appeal to this court. He twice appealed, and at each time suffered the appeal to be dismissed. This is admitted, but the defendant, Murray, declares that the appeals were brought *bona fide*, with an intention to have them argued and decided by this court, but that his counsel advised to the course which was adopted. This

was an answer which ought to be satisfactory. The counsel, after the appeal brought, were of opinion that after certain other steps should have been taken in the cause, the errors which they advised their client existed would be more apparent. The answer is given under oath, is responsive to the bill, and is not contradicted. It must, therefore, be taken to be true, and, if true, rebuts the idea of fraud.

2. That Murray procured the release for much less than the report to which he did not except, and that he was able to pay the whole sum reported due. This fact is conceded to be so; but Murray avers that the amount paid is much more than was really due, and much more than John P. Mumford, in his lifetime, ever claimed, though he was fully apprised of his rights.

3. It is also alleged that the same sum had been previously offered and rejected. To this it is answered, that two years previous the same sum was offered; that an arrangement was partially made by the counsel in the cause for a settlement for thirty-five thousand dollars, and that thirty thousand dollars would have been received, provided the defendant Murray would have paid the costs; and that at the time when the arrangement was made forty thousand dollars would have been assented to by all parties in interest.

It appears that there existed in the family of Mrs. Mumford an unfortunate family difficulty, insomuch as that it was unpleasant for her and Dunscomb to transact business together. So Dunscomb says; but Mrs. Mumford denies that they could not associate for the transaction of necessary business.

4. It is urged as evidence of fraud that the settlement was made without consulting Dunscomb or the complainants. The answer is, the family quarrel already stated; but that, in fact, the consent of Dunscomb was requested by John I. Mumford previous to the execution of the release.

5. It is also charged that Murray had been long endeavoring to circumvent Mrs. Mumford and John I. Mumford, and to take advantage of their situation, both being in necessitous circumstances, and Mrs. M., moreover, being old and infirm. The intention imputed to Murray he denies. He knew that Mrs. M. was poor, and that J. I. M. was insolvent; but it is to be recollected that the same offer was made when these circumstances did not exist, and he made no attempt to obtain more favorable terms than he had before proposed. In answer to the charge that Mrs. M. was old and infirm it is denied, except that she was sixty years old and upwards. This is, indeed, an age which is

supposed to disqualify certain persons for the performance of certain public duties; but the presumption of incompetency, I believe, does not extend to the transaction of private concerns; but if so, still Mrs. M. in this respect had the vantage ground of Murray, who, from facts appearing in the case, must be presumed to be several years in advance of her. But the fact of age is not urged as a ground to support the charge of fraud in Mrs. Mumford. It were, indeed, a melancholy spectacle to see persons, far advanced in life, active participators in fraudulent practices, or even the dupes of others, when the natural presumption should be that as we approach the end of our course, probity and integrity should be predominant, that we may be better prepared to answer the charges to be made against us in that dreadful day of awful responsibility and account which we are rapidly approaching.

6. It is also charged as one of the fraudulent devices resorted to by the defendants, that the late Chancellor Kent was consulted in relation to the settlement, and his advice in favor of it fraudulently obtained.

Of all facts adduced to support a charge of fraud, this is, to my mind, one of the most extraordinary. That the chancellor who had known the whole history of this case, who had established the principle upon which the defendant Murray was to account, who had presided in our courts for a longer period than any other citizen in the state, and who, during all that time, held a most distinguished rank, should be incapable of giving correct and wholesome advice, without consulting the counsel in the cause, is a paradox incapable of explanation. It seems to me, therefore, as it did to the learned judge who decided this cause in the court below, that the charges of fraud have been successfully refuted.

One other circumstance appearing on the part of the defendants is worthy of notice. The persons entitled to the estate of John P. Mumford are, the widow, Mary I. Mumford, and six children, three of whom were in favor of the settlement and three against it. The widow being entitled to one third of the avails of the suit, those concurring in the settlement represent two thirds of the subject in controversy. If they conspired and confederated to cheat anybody, it was to cheat themselves twice as much as they cheated the complainants, which is a palpable absurdity. And, in relation to this point, it should be recollected, that before any examination before the master, Murray made the same offer; and five thousand dollars, or at most ten

thousand dollars, in addition then, and even when the settlement was made, would have been accepted by those who now seek to set aside the release. Of this additional sum, two thirds would have gone into the pockets of the defendants, and but one third to the complainants—less than one thousand dollars to each—a sum which it seems to me could be no equivalent to the mortification resulting from the fact of presenting upon the records of the court a charge of a fraudulent attempt by a mother to defraud her own daughters. When to all these considerations is added, what no doubt had a controlling influence, the determination of Murray to appeal, and the possibility that even less than the thirty thousand dollars might ultimately be recovered after a protracted litigation; and further, that Mrs. M. was advised to this course by a counselor, than whom no one could be more capable of giving advice, so far from seeing in this transaction evidence of fraud, it would have been extraordinary if the offer had not been accepted.

Thus far I have concurred in the views of the learned judge who made the decision in the court of chancery. In the eloquent opinion which we have before us, it is shown very satisfactorily to my mind that the acts of two administrators stand on the same ground as two executors; and the dissent of the third administrator forms no objection to the validity of the release; that it is in no way affected by the doctrine of a *lis pendens*, and that fraud is not imputable to any of the parties to the release. Yet he decreed that it should be held inoperative and void as to the complainants in this cause, who are two of the children of John P. Mumford, not assenting to the settlement and release. This decision is not placed upon any particular principle, but upon the circumstances of the case; the amount of the report compared with the amount received; the compromise carried into effect when the motion was about to be made to supersede the power of the administrators; the uncertainty of the result of an appeal; the possibility of an entire loss of whatever might ultimately be awarded to the estate; and the impossibility of deciding whether the settlement was advantageous to the estate. It is certainly true that there are cases where those interested in an estate are permitted to pursue it into the hands of any person who colludes or conspires with the executor to produce a *devastavit*. It became my duty to examine this subject in the cause of *Coll v. Gilbert, administrator, etc.*,¹ decided in this court one year ago, but which is not yet reported, and to review several of the cases referred to in the opinion of the circuit judge—

1. *Coll v. Lasnier*, 9 Cow. 320.

In the case of *Colt v. Gilbert*, the facts were that Jacob Le Roy was executor of the last will and testament of Dulary; that as such executor, he had in his hands a considerable sum of money which belonged to the estate, and which money was used as part of the capital of the house of Jacob Le Roy and Son; and that Colt, one of the firm, transferred the money of the estate of Dulary to Colt, by Le Roy's direction, as he said, in payment of a debt due him by the firm. In that case we held that the house of Le Roy & Son, and of course Mr. Colt, one of that firm, was responsible to the administrator, with the will annexed, and to the residuary legatee for the amount of the estate thus misapplied, and after referring to the leading cases on the subject, we came to this conclusion: "That any person receiving from an executor the assets of his testator, knowing that such disposition of them is a violation of his duty, is to be adjudged conniving with the executor, and is responsible for the property thus received, either as a purchaser or a pledgee." And the principles laid down by Chancellor Kent, in *Field v. Schieffelin*, 7 Johns. Ch. 150 [11 Am. Dec. 441], were approved: That the purchaser is safe if he is not a party to the fraud of the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was, in fact, by the very transaction, applying them to the extinguishment of his own private debt; that in such case, he buys at his peril; but that if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry, and he may safely repose on the general presumption that the executor is in the due exercise of his trust.

This decision, and the principles established in it, seem to me to bring us back again to the question of fraud and collusion. All the cases cited by the circuit judge are, I apprehend, cases of fraud or collusion. Lord Eldon seemed to be at a loss to determine what collusion is. We have defined it to be any intermeddling with the executor, or the assets of the testator, by which the executor is guilty of a violation of his duty; so that we are brought round again to the question whether the administrators were guilty of a violation of duty, under all the circumstances of the case, and which need not be again recapitulated.

It is true they released for one third of the sum reported in their favor, but it is also true that, according to the answer of Murray (and this answer must be considered true), the sum paid was more than was really due, or was ever claimed by Mr.

Mumford in his life-time. It must also be understood that Murray did not intend to submit to this report, but was about to appeal; and the chancellor, who knew all the facts and the law of the case, advised to the acceptance of the terms offered. It is idle to suggest that fraud was practiced on such a man. Can it be supposed that he was incapable of giving an opinion upon a case which he had adjudged, without the opinion of the counsel? I would by no means depreciate the services of counsel; but it is a mistake to suppose that no one but the counsel employed in a cause is capable of forming a correct opinion as to its probable results, or of giving suitable advice as to its progress or termination.

It is also true that the persons claiming one third of the avails were opposed to the settlement; but the administrators and those interested in the residue, were in favor of it. Suppose the administrators had no interest in the avails, and those owning two thirds of the fund had urged such an arrangement, but it was declined, and in the end much less has been recovered; or suppose the whole had been lost, through the subsequent failure of Murray, after rejecting such an offer; would not those who had urged the settlement have much more reason to call upon the administrators and charge them with a violation of duty? In addition to these considerations, when it is stated as a fact in the case, that a sum in addition, but less than one thousand dollars to each of the complainants, would have been accepted by them, though less than half the sum reported, and this known to the administrators, I am free to express my opinion, that to have refused the offer of thirty thousand dollars, would have been highly indiscreet, if not a positive violation of duty; and that their termination of the controversy was prudent and proper.

I am, therefore, of opinion that the administrators were not guilty of any violation of duty—of course Murray could be guilty of no collusion; and therefore the complainants would have no right to pursue even assets in the hands of a *bona fide* purchaser. But another consideration of some weight is this: that in this instance, the claim in question can not be considered assets for any greater amount than the sum agreed upon.

The result of my conclusions is, that the judge erred in setting aside the release as to the two sixths of the demand in question; and that the decree should be reversed, and that the bill of the complainants should be dismissed, with costs.

SUTHERLAND, J., expressed his concurrence in the opinion

pronounced by the chief justice, and Benton, Crary, Elsworth, Enos, Hager, Lake, McMartin, Oliver, Smith, Todd, Throop, Tysen, Warren, and Wilkeson, senators, also concurred. Dayaa, McCarty, McMichael, Schenek, Stebbins, Wheeler, and Woodward, senators, were of opinion that the decree ought to be affirmed.

Whereupon a decree was entered reversing the decree in the court of chancery, declaring the release executed by Mary I. Mumford and John I. Mumford to John B. Murray, valid and binding upon the representatives of John P. Mumford, deceased; ordering the bill of the respondents to be dismissed with costs, and directing the respondents to pay the costs of the appellants in this court; and that the cause be remitted to the court of chancery, to the end that the decree of this court may be carried into effect.

It being suggested that the appellant had died since the hearing of the appeal, it was ordered that the decree be entered with reference to the time of hearing on the fourteenth day of June last, so as to take effect from that day.

THE DECREE IN THIS CASE WAS SUBSEQUENTLY MODIFIED upon petition of the respondents, by striking out that part giving costs to the appellant: *Murray v. Blatchford*, 2 Wend. 221.

RELEASE BY ONE EXECUTOR OR ADMINISTRATOR.—See, on this subject, the note to *Ewing v. Handley*, 14 Am. Dec. 158. In *People v. Keyser*, 28 N. Y. 228; S. C., 17 Abb. Pr. 217, it was held, citing *Murray v. Blatchford*, that one of two executors or administrators who have taken an obligation to themselves jointly, in their representative capacity, for a debt due the estate, may receive payment and discharge the obligation. In the matter of the *Accounting in Estate of Jos. Black*, 1 Tuck. 146, it is held that executors and administrators can not, by mutual receipts, release each other from their obligations to the estate. In *Clift v. White*, 15 Barb. 73, the principle of the above decision, that executors and administrators have a joint and entire interest, and that the acts of one bind all with respect to the sale, delivery, or release of the goods of the estate, is approved. So, in *Jackson v. Robinson*, 4 Wend. 441, the court reaffirm the doctrine that executors and administrators stand on the same ground with respect to their powers and responsibilities. In the case of *In re Scott*, 1 Red. 236, it is held, citing *Murray v. Blatchford*, that an executor is bound to release a debt due the estate when the interests of said estate require it.

LIS PENDENS.—The law relating to the doctrine of *lis pendens* is examined in the note to *Newman v. Chapman*, 14 Am. Dec. 774.

OCEAN INSURANCE CO. v. FRANCIS.

[2 WENDELL, 64.]

PRELIMINARY PROOF OF THE INTEREST OF THE ASSURED in a lost vessel is waived where the underwriters do not object to the sufficiency of such proof, but refuse to pay on the ground that they are not liable. *Per Walworth, Ch.*

MASTER'S TESTIMONY THAT A VOYAGE WAS FAIR AND LAWFUL, and that the vessel was not engaged in illicit trade, states a matter of fact and not of law. *Per Walworth, Ch., and Spencer, senator.*

GENERAL EVIDENCE OF THE TRUTH OF A WARRANTY OF NEUTRALITY throws the burden upon the other party to falsify the warranty. *Per Walworth, Ch., and Spencer, senator.*

PAROL PROOF OF THE CONTENTS OF A PAPER, alleged to be lost, is admissible where the evidence warrants a reasonable presumption that it was deposited with an officer of the court, and he testifies that after careful and diligent search he can not find it. *Per Walworth, Ch.*

PERSON NOT A PARTY IS NOT BOUND BY THE JUDGMENT OF A FOREIGN COURT merely because he is a subject of the government under which the court was organized. *Per Walworth, Ch.*

JUDGMENT OF A COURT OF COMPETENT JURISDICTION is conclusive upon the parties and can not be questioned collaterally in the courts of the same country. *Per Walworth, Ch.*

SENTENCE OF CONDEMNATION OF AN INSTANCE COURT OF ADMIRALTY is conclusive to change the property, and the forfeiture can not be questioned collaterally in any other court of the same country. *Per Walworth, Ch.*

CONDEMNATION OF A VESSEL AS LAWFUL PRIZE under the law of nations, by an admiralty court, is conclusive to change the property in every collateral inquiry in other courts of the same country. *Per Walworth, Ch.*

SUCH CONDEMNATION IS HELD CONCLUSIVE AGAINST ALL THE WORLD, in the courts of England and the United States, and in some of the states, not only to change the property, but to preclude direct or collateral inquiry into the facts upon which it is founded in the courts of the same or any other country. *Per Walworth, Ch.*

IN THIS STATE, THE SENTENCE OF A FOREIGN COURT OF ADMIRALTY condemning property as lawful prize under the law of nations, though conclusive to change the property, is only *prima facie* evidence of the facts upon which it is founded, and may be rebutted by proof in a collateral action.

SENTENCE OF A FOREIGN ADMIRALTY COURT ACTING AS A MUNICIPAL COURT, and not as a prize court, condemning a vessel for a violation of navigation laws, is not even *prima facie* evidence of a breach of warranty not to engage in illicit trade contained in a policy of insurance on such vessel, without proof of the law alleged to have been violated.

LAW OF NATIONS IS JUDICIALLY NOTICED by the courts of all civilized countries. *Per Walworth, Ch.*

FOREIGN MUNICIPAL LAWS MUST BE PROVED like other facts. *Per Walworth, Ch.*

ASSURED'S RIGHT OF ABANDONMENT FOR AN ILLEGAL CAPTURE is not affected by the supercargo's neglect to put in a claim to the vessel. *Per Walworth, Ch.*

EXCEPTIONS TO INTERROGATORIES, annexed to a commission to take testimony, may be taken at the trial. *Per* Spencer, Senator.

TO MAKE A DECREE EVIDENCE OF THE GROUNDS upon which it is based, it must appear: 1. That the court had jurisdiction. 2. What the grounds of the decree were. *Per* Spencer, Senator.

DECREE, WHEN INSUFFICIENT AS EVIDENCE.—A decree pronouncing a vessel "to be forfeited and lost for a breach of some or one of the laws relating to trade and navigation" is not sufficiently precise to be entitled to credit as a judicial proceeding, and will not be aided by the libel. *Per* Spencer, Senator.

VIOLATION OF SOME PRECISE LAW must be established by a decree of condemnation of a foreign court of admiralty, relied upon by an insurer, to prove that a vessel was engaged in illicit trade. *Per* Spencer, Senator.

ERROR to the supreme court in an action of assumpsit for a total loss on a policy of insurance. The facts appearing on the trial below are reported in *Francis v. Ocean Insurance Co.*, 6 Cow. 404. The policy sued on contained a warranty, on the part of the assured, against damage or loss which might arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, etc. It appeared that the plaintiff, the owner of the vessel, was a British subject; that the vessel was insured for a voyage from Middletown, Connecticut, to one or more islands in the West Indies; that she sailed on said voyage under the British flag with Robert Garrick, a British subject, as master, and a British register; that she had been repaired at Middletown, but for less than fifteen shillings per ton; that while standing off and on the port of St. Johns, in Antigua, to try the market, about December 25, 1827, Thomas Francis, another British subject, being supercargo, she was seized by the British ship *Antelope*, and libeled and condemned in the court of vice-admiralty at Antigua; that the supercargo intended to make a defense, but was prevented from doing so by being misinformed of the time and place of the hearing; and that when seized the vessel had among her papers a license from the British consul at New York to complete her crew with seamen not British; that all the papers were filed in the vice-admiralty court, but the registrar who was examined on commission could give no account of said license, whereupon the plaintiff, against the objection of the defendants, was allowed to give parol evidence of the contents. By the libel and sentence, which were proved by the plaintiff under commission, it appeared that the vessel was captured and libeled: 1. As importing goods, etc., not being a British vessel, or manned with a crew three fourths British, contrary to the British statute. 2. As importing goods prohibited by statute. 3. As having been repaired at Middletown to an

amount exceeding fifteen shillings per ton, and yet importing goods contrary to said statute, etc. The decree recited that no claim to the vessel had been interposed, and condemned both vessel and cargo as forfeited "for a breach of some or one of the laws relating to trade and navigation." It was admitted that no preliminary proof of the assured's interest was furnished to the defendants, but, on presenting the other preliminary proofs, the defendants answered that "they would not settle the claim in any way." It further appeared that the plaintiff, at considerable expense, prosecuted a claim before the lords commissioners of the British treasury for the proceeds of the ship, and that they made an order restoring the net proceeds. Verdict for the plaintiff for eight thousand dollars, upon which a judgment was rendered in his favor in the supreme court. To reverse that judgment this writ of error was sued out. The questions arising in the court of errors are sufficiently stated in the opinion of the chancellor.

G. Griffin and D. B. Ogden, for the plaintiffs in error.

W. Betts and J. Duer, for the defendants in error.

THE CHANCELLOR. In the documents exhibited as preliminary proofs, the interest of Basil Francis was distinctly stated. The insurers made no objection that there was not sufficient proof of interest, but put their refusal to pay on the ground that they were not liable for the loss. That was a waiver of any further preliminary proof of the interest of the assured, and brings this case directly within the decision of the supreme court in *Vos v. Robinson*, 9 Johns. 192. Neither is there any validity in the objection to the answers of the master to the eleventh and twelfth interrogatories. He testified that, so far as his knowledge extended, the voyage was fair and lawful; that the vessel was regularly cleared; that he knew nothing of any illicit transactions on the voyage; and that she was not engaged in any illicit trade while he commanded her. This was not swearing to the law, but to the facts. If the witness had no reason to believe the trade was illicit or unlawful, his answers to the interrogatories were correct and proper. If there were any facts within his knowledge which, in contemplation of law, would render the trade illegal, the insurers, by proper cross-interrogatories, might have drawn out those facts, and thus have restricted his general answers.

Whether it was necessary for the assured to give anything more than general evidence of the brig's being regularly docu-

mented as a British vessel, before some doubt was thrown on the subject by the opposite party, is a question which does not appear to have been distinctly settled. Marshall says: "In the case of a warranty that the thing insured is neutral property, it is usual at the trial to give general evidence of the truth of that warranty, and leave it to the defendants to falsify it, or prove a breach or forfeiture of it:" 2 Condly's *Marshall*, 714. In the case of *Coolidge v. The New York Fire Insurance Company*, 14 Johns. 308, the only evidence produced to prove the interest of the plaintiff, and to show that the vessel was documented as an American ship, was a certified copy of the register. The court decided that such a copy was not legal evidence, and that a sworn copy should have been produced. No general proof was offered, and, of course, the question whether the onus of showing the particular defect in the documenting of the vessel lay on the defendants, did not arise.

In the case of *Ludlow v. The Union Insurance Company*, 2 Serg. & R. 119, the supreme court of Pennsylvania decided that under the warranty of neutral property, it was sufficient for the plaintiff, in the first instance, to give general evidence of neutrality, leaving it to the defendants to show probable cause to suspect that the necessary papers were wanting; after which the burden of proof would be thrown upon the plaintiff. It is also doubtful whether the objection to the parol evidence of the consular certificate was raised on the trial. The only objection stated in the bill of exceptions is that which was made to the reading of Sayre's affidavit, annexed to the record of the proceedings in the admiralty court. Independent of that affidavit, I think there was sufficient evidence of the loss of the paper to allow parol evidence of its contents to be given. Thomas Francis, the supercargo, was dead; his brother Charles testified that he procured the certificate or license from the British consul, and delivered it to his brother Thomas two days before the vessel sailed; that his brother put it into a tin box with the ship's register, and that it was taken possession of by the captors. The reasonable presumption is that this certificate, with all the other ship's papers, was deposited with the registrar of the court, according to the usual practice in such cases. The registrar testifies that after a careful and diligent search, the only proceedings which have come to his hands are those which are annexed to his deposition. It can not be necessary, in this case, to examine the question how far a person is bound by the legislative or even the executive acts of the gov-

ernment to which he belongs. Although the judges of the king's bench, in the recent case of *Campbell v. Innes*, 4 Barn. & Ald. 423, appear to have discarded the liberal doctrines held by Chief Baron Thompson in *Basett v. Meyer*, 5 Taunt. 824, I believe it has never before been contended that a person not a party to the suit was conclusively bound by the judgment of a foreign tribunal, merely because he was the subject of the government under which that tribunal was organized. It is a general principle of the common law that the judgment of a court of competent jurisdiction is binding and conclusive against all the parties to the suit, and can never be reviewed in a collateral action in any of the courts of the same state or country. And the same rule applies to the decisions of the exchequer, instance court of admiralty, and other courts proceeding *in rem* for the condemnation of property seized as forfeited. In all such cases the sentence of condemnation is final and conclusive to change the property; and the question of forfeiture can not be inquired into collaterally in any other court of the country where such condemnation took place: *Scott v. Shearman*, 2 W. Bl. 977; *Duchess of Kingston's case*, 11 State Trials, 261; *Hoyt v. Gelston & Schenck*, 13 Johns. 141.

There is another class of cases growing out of the decisions of admiralty courts when proceeding as prize courts, agreeably to the law of nations. In all such cases, the decisions of the court condemning a vessel or cargo as a good and lawful prize, is conclusive to change the property, and can never be inquired into collaterally in any of the courts of the country under whose jurisdiction such condemnation took place. It has also been decided in the supreme court of the United States, and in some of our sister states, as well as in England, that the sentence is final and conclusive against all the world, not only to change the property, but as to the facts on which the condemnation was founded, and that neither can be examined either directly or collaterally by the courts of any other country: *Cronsdon v. Leonard*, 4 Cranch, 434;¹ *Dempsey v. Insurance Company of Pennsylvania*, 1 Binn. 299, note; *Baxter v. The New England Marine Insurance Company*, 6 Mass. 277 [4 Am. Dec. 125]; *Stewart v. Warner*, 1 Day, 143 [2 Am. Dec. 61]. This court, however, has adopted a different rule, which must now be considered as the settled law of this state. It is, that the sentence of a foreign court of admiralty, condemning the property as a good and lawful prize, according to the

1. *Cronsdon v. Leonard*, 4 Cranch, 434

law of nations, is conclusive to change the property, but is only *prima facie* evidence of the facts on which the condemnation purports to have been founded; and in a collateral action, such evidence may be rebutted by showing that no such facts did, in reality, exist: *Vanderheuve v. United Ins. Co.*, 2 Johns. Cas. 451 [1 Am. Dec. 180]; *New York Fireman Ins. Co. v. De Wolf*, 2 Cow. 56.

If the decisions of prize courts, acting under the law of nations, are only *prima facie* evidence of the facts on which those decisions are founded, there can be no good reason why the decision of a foreign court, founded upon the alleged violation of some municipal regulation, should be more conclusive. It is admitted that the judgment of a foreign municipal court, even between the same parties, where a suit is brought directly upon that judgment, is not conclusive, but only *prima facie* evidence of the indebtedness. And, surely, there can be no good reason why it should be more conclusive in a collateral action between parties who have never appeared or submitted their rights to the decision of such foreign tribunal. The instance court of admiralty, in Antigua, which condemned the brig *Frances*, was not acting as a prize court under the law of nations, but merely as a municipal court, to carry into effect the British navigation laws. To show a breach of the warranty in the policy, even *prima facie*, by the decree of condemnation, it was incumbent on the insurers to prove the existence of the law alleged to have been broken. The decree of condemnation, even in prize causes, does not establish the law, but is merely the decision of the court that the facts established rendered the property a lawful prize, agreeably to the law of nations. The courts of all civilized countries will judicially take notice what that law is; and if it appear by the proceedings in the prize court that the condemnation was not for a breach of the law of nations, it will not be considered as binding upon the courts of other countries, upon the question of neutrality: *Pollard v. Bell*, 8 T. R. 434. But we can not judicially notice the municipal laws of foreign countries; they must be proved like other facts. In this case, if the proceedings of municipal courts were evidence of the existence of the laws on which they purport to be founded, there was no evidence of the breach of warranty which is not completely rebutted by the testimony on the part of the assured. The libel charged that the brig, being an English vessel, had become forfeited, because she had imported goods, wares, and merchandise into the port of St. Johns, in the island of Antigua, by way of merchandise,

contrary to the form of the statute; and the judge pronounced the vessel and cargo forfeited and lost for a breach of some or one of the laws relating to trade and navigation. Admitting there was a law of England subjecting the vessel and cargo to forfeiture for the causes alleged in the libel, the evidence produced on the trial of this cause showed conclusively that no such cause of forfeiture existed. The vessel was bound to the Windward islands and a market. The captain testifies that he was standing off and on the port of St. Johns to try the market, and that at the time of capture, the brig had not touched at any place, or broken bulk, or exchanged or delivered anything out, or received anything on board after leaving America.

In any view of this case there is no legal evidence of the breach of the warranty, either as to the character of the vessel, or against seizure or detention on account of illicit or contraband trade. The assured having a perfect right to abandon in consequence of the illegal capture, the neglect of the supercargo to put in a claim did not affect the right of abandonment: *Gardere v. The Columbian Ins. Co.*, 7 Johns. 514. It may have been the duty of the master, as the agent of all concerned, to take the necessary steps to prevent a condemnation by default; but under the circumstances, a sufficient excuse is shown for the omission of both the supercargo and master in not putting in a claim. I think the decision of the supreme court was correct, and that the judgment should be affirmed.

SPENCER, Senator. The first point urged by the plaintiffs in error, that there was not sufficient preliminary proof of interest in the assured to warrant a recovery, is fully and satisfactorily answered in the opinion of the supreme court. The testimony of Charles Francis, which is uncontradicted and unexplained, shows that the president of the Ocean insurance company not only absolutely refused to settle the claim in any way, but that he put that refusal upon a specific ground, viz., that the account "had been adjusted and settled by a receipt on a previous insurance." By this declaration of the authorized agent of the plaintiffs in error, the interest of the defendant in the property insured was not only admitted, but was alleged to have been recognized, and his claim satisfied. If even silence is a waiver of the necessity of producing preliminary proof, as would appear from 1 Johns. 280, surely this recognition of interest in the claimant must forever preclude the adverse party from denying it.

The second point presents an objection to the answers of

Robert Garrick to the eleventh and twelfth interrogatories. One of the answers given by the supreme court, that the objection comes too late, and that exceptions should have been taken to the interrogatories, is not satisfactory to my mind. The practice of taking depositions by a commission to which interrogatories are annexed, is borrowed from the equity courts. In those courts a motion to suppress the answers to interrogatories, on objections to their form, is common, and after publication they are referred to a master to report upon the exceptions: 1 Harrison, 355. An analogous practice in courts of law would leave the interrogatories open to exception after the testimony was taken. If exceptions are to be made to the decision of the judge who settles the interrogatories, either party must necessarily possess the right of appealing from that decision. This appeal must be determined before the deposition of the witness can be properly taken, and consequently the whole object of this salutary proceeding to obtain and procure testimony is effectually defeated.

A distinction is made by Lord Ellenborough, in 4 Mau. & Sel. 502, between depositions taken on a bill filed to perpetuate testimony, and those taken in a cause depending in court. In the latter he remarks that the party comes with his objection fresh at the trial. That case seems to indicate the practice in England to be to allow exceptions to interrogatories proposed in the progress of a cause to be made when the answers are offered in evidence. Mr. Dunlap, the writer referred to by the supreme court, is not sustained by any authorities; nor do his remarks sustain the position of the court that objections can not be taken at the trial. In point of fact, the practice at the circuits has been, so far as I am informed, to object to a written interrogatory at the same time and with the like effect as to a verbal question. As well upon authority as upon the reason of the case, I think it the better practice. I think, therefore, the exception was properly taken at the trial.

But the validity of the exception itself remains to be inquired into. The ground of the exception is, that in those answers Garrick testifies to a question of law, and not to a fact. The answer to the twelfth interrogatory is, that while he commanded the vessel she was not engaged in any illicit trade with any power or powers. Here is a distinct fact asserted; and it is no more a statement of law than any other assertion which contains a legal term. How was the interrogatory to be otherwise answered than by a general negative? Was the wit-

ness to recapitulate every act which in his view would constitute an illicit trade, and deny each separately? With regard to the answer to this interrogatory, the objection seems to me unfounded in point of fact. The answer to the eleventh interrogatory is of a like character: "As far as his knowledge went, the voyage and the trade were fair and lawful; he knew nothing of illicit transactions on the voyage." These are facts of which he speaks distinctly and directly. Had the opposite party inquired of him whether particular transactions, specifying them, had occurred, and the witness had answered in the affirmative, or if he had himself stated any particular facts; in either case, his mere opinion of legality of those acts would have been useless, and even impertinent. But even then the inquiry would have remained, What bearing do those answers have on the case? As testimony, none whatever; as law, they would have been ridiculous. So, in this case, the part of the answers relating to facts, is evidence; that relating to law is blank paper.

No jury could be misled, and certainly no court could be governed by such expositions of law. This point, I think, also entirely fails. The third objection, that there was not sufficient proof of the loss of the consular certificate to entitle the defendant in error to give parol evidence of its contents, is satisfactorily answered by the supreme court, and no addition would increase its force. There is, however, a ground on which both the second and third points may be placed, and which goes directly to the merits of the cause. The insured is not held to specific proof that the vessel is of the character warranted. That is presumed upon the general proof, and the insurer, in this as in all other cases of setting up the breach of a condition by his adversary as a defense, must prove that breach, or at least must rebut the general presumption by proof on his part: 2 Marsh. 714; 2 Serg. & R. 133. Rejecting, therefore, the answers of Garrick to the eleventh and twelfth interrogatories, and rejecting the proof of the consular certificate, which went to show the vessel was manned by the requisite number of British seamen, still the plaintiffs in error are in no better condition. The defendant in error will have failed to prove the innocence of the voyage, and the national character of his vessel; but the plaintiffs in error will not, therefore, have established the illegality of the voyage, or the breach of the warranty respecting the vessel. The course of the argument on the part of the plaintiffs in error seems to admit the principle

that the burden of proof lay on them; for in the fifth point they urge that the sentence of condemnation of the court at Antigua, is *prima facie* proof that the vessel had been guilty of a violation of the British laws concerning trade and navigation.

In the view which I have taken of this case, this is the point which should naturally be next considered. It can not be denied that the judgment or decree of any court having jurisdiction of the subject-matter, is evidence of the grounds upon which it was rendered. The force of this evidence, whether presumptive or conclusive, it is not necessary to consider in this stage of the inquiry. But from the terms of the proposition, two things must appear: 1. That the court had jurisdiction; 2. The ground of the decree. I think the supreme court correct in their conclusion, that this vessel was within the jurisdiction of the court of Antigua. But I do not think the grounds of the determination appear with sufficient precision to entitle this decree to any respect or credit as a judicial proceeding. It pronounced the *Snow Frances* "to be forfeited and lost for a breach of some or one of the laws relating to trade and navigation." If there were no causes set forth in the libel or other proceedings, would this general declaration amount to any more than saying that the vessel was condemned for some cause or other? And is there a tribunal in christendom that would recognize a document in such terms, as a judgment?

Nor does a reference to the libel help the alleged adjudication. The court of Antigua has not adopted the causes set forth in the libel, as the grounds of its judgment; but so far from it, that it undertakes to set out its own grounds. But for the purpose of the argument, suppose it fairly to be inferred, because the libel is attached to this judgment, that it therefore furnishes the reasons for it, yet this palpable defect will not be supplied; for the libel, as justly remarked by the supreme court, states not only various, but inconsistent causes of condemnation; and it is wholly impossible to deduce from it, in connection with the sentence, the specific ground of condemnation. The cases cited by the counsel for the defendant in error, and which were not controverted, seem to establish beyond a doubt, that where the insurer seeks to defend himself on the ground that the vessel has been engaged in an illegal trade, and offers the sentence of a foreign court to establish the facts, that sentence must establish a violation of some precise law. Tested by this rule, the sentence in this case is on its face so defective, that it is evidence of nothing. There is another principle stated

by the supreme court, and fully supported by the authorities cited, that the fact of seizure and condemnation is not alone sufficient; but that the law which is alleged to have been violated by an illegal trade, must be produced and proved by the insurers relying on a sentence of condemnation. This has not been done, and the sentence therefore establishes nothing. I forbear from discussing the question, whether the sentence has or has not been successfully impeached by the facts of the case. It is enough that it was not in itself sufficient to sustain the defense of the insurers, and the plaintiff below was not called upon to impeach it by contradicting its alleged grounds.

This view disposes of the sixth point, that there was a breach of the warranty of the national character of the vessel. The defendants below held there, as they held here, in the very terms of their proposition, the affirmative of this question. They alleged there was a breach: they have utterly failed to prove it. The fourth point now presents itself for consideration, viz., that the assured can not recover for an act done under the authority of his own state. But how does it appear that the seizure and condemnation were under the authority of the British government? If the views taken in considering the fifth point are correct, we are without any evidence on the subject. We have no evidence that there was any law of the British government prohibiting the importation of goods on board a vessel not being wholly owned by a subject and navigated by a British master, etc., which is the first ground alleged in the libel; nor of any law forbidding the importation of the goods specified in the second ground; nor of any law rendering a vessel alien on account of the alleged repairs stated in the third count; nor of any law prohibiting the importation of the enumerated articles in the fourth count, from the United States. Are we to be supposed acquainted with the municipal regulations of trade established by England without their having been proved? In the absence, then, of this proof, which the plaintiffs in error were incontestably bound to adduce, we have no right to say that the acts of the officers at Antigua were authorized by their own government; on the contrary, the legal maxim, that that which is not proved, does not exist, compels us to say, that those acts were illegal and wholly unauthorized. The question of law, therefore, presented by the fourth point, is wholly gratuitous, it does not rise in the case; and we might as well be called upon to decide the validity of a devise, as to determine that point. Independent of the general objection to theorizing and

speculating on points not in the case before us, there is a peculiar satisfaction in being relieved from the investigation and decision of this point. I have looked into it sufficiently to discover that it is one of great difficulty, and in reference to which the decisions of the English courts can not be relied upon, as well from their own contradictions, as from the peculiar political principles which control that government and its courts. It is identified with great principles of civil liberty, and with the fundamental doctrines of the reciprocal rights and duties of governments and their subjects, which have furnished themes for copious illustration by the statesmen and jurists of the world. Upon all these questions, the statesmen of our own country have maintained opinions which have been combated by those of foreign countries, but which, I doubt not, will one day become the law of this country. At present it is as unnecessary as it would be presumptuous in me to attempt to ascertain and define the existing law in respect to the question, how far, and in what cases, a citizen is bound to look to his own government only for redress for injuries committed by the judicial, legislative, or executive departments within the scope of their authority.

The seventh, and only remaining point, did not seem to be much pressed on the argument. It is not perceived how a failure by the agent of the assured to interpose a defense, after the loss had actually occurred, can in any way affect the claim for a total loss. The case in 7 Johns. 514, seems decisive against the objection. Other objections were suggested in the course of the argument, which it is not deemed necessary to notice, because they were not made at the trial, do not appear on the bill of exceptions, and related to supposed defects in testimony, which might have been supplied at the time if the objection had been made.

I am of opinion that the judgment of the supreme court ought to be affirmed.

This being the unanimous opinion of the court, it was thereupon ordered and adjudged that the judgment of the supreme court in this cause be affirmed, and that the plaintiffs in error pay to the defendant in error his costs and charges in and about his defense, in this court to be taxed, and that the record be remitted, etc.

AS TO THE CONCLUSIVENESS OF JUDGMENTS, GENERALLY, see *Le Guen v. Gouverneur*, 1 Am. Dec. 121; *Betts v. Starr*, 13 Id. 94; *Killeffer v. Herr*, 17 Id. 658.

FOREIGN LAWS, PROOF OF.—For an extended examination of this subject, see *State v. Twitty*, 11 Am. Dec. 779, and the note thereto. See, also, *Boggs v. Reed*, 12 Id. 482; *Hunter v. Fulcher*, 16 Id. 738, and cases cited in the note thereto.

THE PRINCIPAL CASE IS CITED in *American Insurance Co. v. Cattell*, 4 Wend. 86, with respect to the evidence necessary to establish the condemnation of a vessel under certain circumstances; and in *Etna Fire Ins. Co. v. Tyler*, 16 Wend. 401; *Rogers v. Traders' Ins. Co.*, 6 Paige, 586, and *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 286, on the point that where there is a defect in the preliminary proofs of interest, etc., but the insurers do not object on that ground, the defect is deemed waived.

CAMPBELL v. STAKES.

[2 WENDELL, 137.]

INJURY BY INFANT TO HIRED HORSE, REMEDY FOR.—Trespass, and not case, is the proper remedy where an infant, having hired a horse, uses him with such violence and cruelty that he dies.

IF CASE IS BROUGHT FOR SUCH AN INJURY, it affirms the hiring, and the plea of infancy is a good defense.

CONTRACT OF AN INFANT IS NOT VOID, but voidable, at his election.

TRESPASS WILL NOT LIE FOR BARE NEGLIGENCE BY AN INFANT or adult to use a hired animal with ordinary care, to protect him from injury, and return him as agreed upon.

WILLFUL AND POSITIVE ACT BY AN INFANT in such a case amounting to an election to disaffirm the contract, entitles the owner to immediate possession.

FOR A WILLFUL AND INTENTIONAL INJURY BY AN INFANT to a horse hired by him, trespass will lie.

PLEA OF INFANCY in such case, with an averment that the injury occurred through the defendant's unskillfulness and want of knowledge, discretion, and judgment in driving said animal while bailed to him, would be a good answer to the action, but without such averment, the injury will be presumed willful, and will amount to an election to disaffirm the contract.

RIGHT TO BRING ERROR WAIVED BY AMENDMENT.—Where, after a judgment in a party's favor has been reversed, he elects to amend his plea, he waives his right to bring error on the judgment of reversal founded on the original pleadings.

VERDICT IN THE SUPREME COURT WHICH IS DEFECTIVE, in not finding on one of the issues presented by the pleadings, can not be taken advantage of in the court of errors, if not first brought directly to the notice of the supreme court, by motion in arrest of judgment, or otherwise.

COURT OF ERRORS IS STRICTLY AN APPELLATE COURT, and can only correct erroneous decisions of inferior tribunals on questions actually presented to them.

ILLEGAL JUDGMENT ACTUALLY RENDERED IN A COURT OF LAW on a question directly before it, will not be sustained in the court of errors, merely because the party failed to urge every valid objection against it on his argument in the court below, but a more stringent rule prevails on appeals from chancery.

WHAT MAY BE ALLEGED IN ARREST OF JUDGMENT.—Any matter on the record which might be assigned for error after judgment, may be alleged in arrest of judgment, and an erroneous decision thereon reviewed in the court of errors.

ERROR to the supreme court in an action of trespass originally brought in the court of common pleas against Samuel and Thomas Campbell for driving a certain mare belonging to the plaintiff with such violence, and so whipping and cruelly treating her, that she died. Samuel Campbell was alone served, and appeared by guardian. Pleas: 1. *Non cul.*; 2. That the mare, at the time of the alleged injury, was in the possession of the defendants on a contract of bailment and letting to him, and that at the time of the contract, as well as of the alleged trespass, the defendants were both infants under the age of twenty-one. On demurrer to the second plea and joinder, the court of common pleas gave judgment for the defendant. On writ of error, removing the record into the supreme court, that judgment was reversed, and judgment given for the plaintiff for costs, and a *venire de novo* awarded. Afterwards, on leave obtained, the defendant amended his second plea, so that, after averring that the mare was in the defendant's possession under a contract of bailment, etc., alleged that the supposed beating, over-driving, etc., occurred through the unskillfulness, want of knowledge, discretion, and judgment of the defendants, and that after the termination of the contract she was returned to the plaintiff in full life, concluding with an averment of the defendant's infancy, as in the original plea. The plaintiff replied *precludi non*, because the defendant, of his own wrong, and without cause by him in his plea alleged, did, with force and arms, commit the said trespass, etc., and further, that at the time, etc., the defendant was of full age, etc. The jury, at the circuit, found the defendant guilty of the trespass laid to his charge, etc., and assessed the damages, but took no notice of the issue of infancy. Judgment in the supreme court in favor of the plaintiff on this verdict, to reverse which this writ of error was brought by John Campbell, the administrator of Campbell, defendant, now deceased. There was a general assignment of error that the declaration was insufficient, etc.,

and also a special assignment of error, in reversing the judgment of the common pleas. Plea, *in nullo est erratum*.

J. Platt, for the plaintiff in error, claimed: 1. That the verdict was defective, and would not support the judgment, because there was no finding on the issue as to the defendant's infancy; 2. That the mare having been in the possession of the defendant under a contract of bailment at the time of the injury, the plaintiff had neither actual nor constructive possession, and could not, therefore, maintain trespass, but that the remedy, if any, was by a special action on the case: *Bac. Abr.*, Trespass, B; *Bro. Abr.*, Action on the Case, pl. 99; *Id.* Trespass, pl. 295, 327; 13 *Johns.* 414; 1 *Chit. Pl.* 167; 3. That no action would lie in this case on account of the infancy of the defendant: *Jennings v. Rundall*, 8 T. R. 335; *Bing. on Inf. and Cov.* 111; and the injury having been done in the exercise of rights conferred by the contract of bailment, the plea of infancy could be interposed, and the defendant could not be deprived of this privilege by changing the form of the action: *Green v. Greenback*, 2 *Marsh.* 485; 1 *South.* 87.

J. Anthon, for the defendant in error, insisted: 1. That the defendant, by electing to amend his plea, had waived his right to object to the reversal of the judgment on the original pleadings; 2. That the verdict was not defective, because the finding of guilty applied to both issues; that, if it was defective, it was cured by the statute of jeofails, and that, in any event, the defendant not having made the objection in the supreme court, could not agitate the question here: 2 *Cow.* 45; 2. That trespass was the proper form of action, the destruction of the property being a disaffirmance of the contract; 3. That an infant was liable for torts, citing cases referred to by *Marryat arguendo*, in 8 T. R. 335; *Peake N. P.* 223; 1 *Esp. Cas.* 172; 1 *Nott & McC.* 199 [*Word v. Vance*, 9 *Am. Dec.* 683]; *Vasse v. Smith*, 6 *Cranch*, 226.

THE CHANCELLOR. The first point made by the plaintiff is, that the action should have been case, and not trespass. If the object of this point is to support the first error assigned, to wit, that the declaration is insufficient, it certainly can not be sustained. The declaration is in the ordinary form of a declaration in trespass, and I can see no objection to it, either in form or substance. But I presume this point was intended to apply to the case made by the special plea of the defendant in the court below. I am satisfied an action on the case can not be

maintained against an infant under such circumstances. If the infant was liable at all, trespass was the proper form of action. An action on the case necessarily supposes the defendant to have a right to the possession of the property under the contract of hiring, at the time the injury is committed. Independent of the contract of hiring, the defendant would have no right to the possession, and trespass would be the proper remedy. If the plaintiff declares in case, he affirms the contract of hiring, and the plea of infancy is a good defense to such an action; for he can not affirm the contract, and at the same time, by alleging a tortious breach thereof, deprive the defendant of his plea of infancy. The cases of *Jennings v. Rundall*, 8 T. R. 335, and *Green v. Greenbank*, 4 Eng. Com. Law Rep. 375;¹ 2 Marsh. 485, were cases of that description. The contract of an infant is not void, but is voidable at the election of the infant. If a horse is let to him to go a journey, there is an implied promise that he will make use of ordinary care and diligence to protect the animal from injury, and return him at the time agreed upon. A bare neglect to do either, would not subject him or an adult to an action of trespass, the contract remaining in full force. But if the infant does any willful and positive act, which amounts to an election on his part to disaffirm the contract, the owner is entitled to the immediate possession. If he willfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse, an action of trover would lie, and his infancy would not protect him. The case of *Vasse v. Smith*, in the supreme court of the United States, 6 Cranch, 226, was decided upon this principle.

The special plea in the court of common pleas was defective in not averring the fact, which was afterwards inserted in the amended plea, that the injury complained of occurred in the act of driving the mare through the unskillfulness and want of knowledge, discretion, and judgment of the defendant. With that averment, I think the plea of infancy, with the contract of hiring, would have been a complete answer to the action. But without such averment I think the court were bound to presume it was a willful injury, which would amount to an election by the infant to disaffirm the contract. I, therefore, am of opinion that the judgment of the supreme court on the pleadings as they stood was correct. I am also of opinion that the defendant in the court below, by electing to amend his pleadings, waived his right to bring a writ of error on the judgment of the supreme

1. 4 Eng. Com. L. R. 496.

court, founded on the original pleadings. If the cause had been originally commenced in the supreme court, the former pleadings would not have been found in the record. As the *venire de novo* was awarded in the supreme court, and these proceedings formed a part of the record of the court of common pleas, which was brought into the supreme court by writ of error, it was, perhaps, necessary that the original pleadings should remain upon the record. But the election of the defendant to waive them by amending his plea, also forms a part of the record; and he can not now take advantage of any error in the judgment of the supreme court, founded on the original pleadings.

The only remaining question is, Can the plaintiff in error take any advantage of the defective finding of the jury on the issues arising out of the amended pleadings? I understood the counsel of the plaintiff in error to admit, on the argument, that this question had never been brought before the supreme court by a motion in arrest of judgment or otherwise. There is a manifest difference to be observed between the proceedings on writs of error in this court and the proceedings of the supreme court on writs of error to inferior tribunals. The supreme court are bound to correct all errors in the proceedings of inferior tribunals which are brought before them, whether they relate to decisions either actually or nominally made by the court below, or to matters out of the record, usually denominated errors in fact. But in the organization of this court, it was evidently the intention of the framers of the constitution, that it should be strictly an appellate court, for the re-examination and correction of erroneous decisions actually made by other tribunals, upon questions actually presented to them for their determination. The provisions in the constitution requiring the judges of the supreme court, on writs of error, to assign the reasons for their judgment, and excluding them from voting in favor of the affirmance or reversal of their judgments, are both founded upon the presumption that they have actually passed upon the question in the court below. I had supposed that the opinion of the late Chancellor Sanford, in *Golden v. Knickerbocker*, 2 Cow. 31, which was concurred in by the majority of this court, had put this question finally at rest here. But as the same question is constantly agitated, it may be advisable that the court should express an opinion upon that subject which can not be misunderstood. In *Cheetham v. Tillotson*, 5 Johns. 430, a judgment by default was reversed for a defect in the declaration. I

presume in that case there had been no motion in arrest of judgment in the supreme court; but that question was not raised or passed upon by this court.

In *Sands v. Hildreth*, 12 Johns. 493, this court decided that no appeal lies from a decree of the court of chancery, pronounced on the default of the defendant at the hearing. And in *Gelston v. Hoyt*, 13 Johns. 361,¹ it was decided that the plaintiff in error could not take advantage here of any erroneous decision of the supreme court on demurrer, where he had declined arguing the demurrer in that court. In *Henry v. Cuyler*, 17 Johns. 469, the plaintiff in error having suffered the judgment to pass against him by default, at the argument of the demurrer in the supreme court, this court refused to hear the cause, although the same question had previously been decided in the supreme court on argument in another case, and although the cause was brought up to this court by consent of parties, for the purpose of reviewing that decision.

All these cases show the settled practice of this court not to review a decision or judgment of the supreme court, or court of chancery, where the question has not been actually passed upon or distinctly presented to the court below. I am not aware of any case where the question has been raised, in which this court has decided differently. There is another class of cases which are of an entirely different character, and in which the practice must, in some measure, be regulated by the sound discretion of this court. These are cases which the court below has passed upon, but in which this court is asked to reverse or modify the decision upon some new point not urged upon the consideration of the court upon the argument of the cause in the court below. These cases most frequently arise on appeal from the court of chancery. The litigated causes which come before that court are usually very complicated. The bill sometimes contains only the common prayer for general relief. It also frequently happens that a party is not entitled to the particular relief prayed for in his bill, or insisted on in argument, though he may be entitled to some different kind of relief not urged or thought of by him, while the cause was pending in the court below. In such cases, this court will not reverse the decree of the chancellor, for the purpose of giving the appellant a remedy which he did not ask for there: *Per Lord Eldon*, in *Chamley v. Lord Dunsany*, 2 Sh. & Lef. 700. In courts of law, the cases for consideration are more simple; and

1. 13 Johns. 561.

this court in general will not sustain an illegal judgment, merely because the plaintiff in error has neglected to urge every valid objection which might have been insisted on, by way of argument, in the court below. Thus, in *Palmer v. Lorillard*, 16 Johns. 343, where, in an action of assumpsit, the facts found by the special verdict entitled the plaintiffs to a verdict in an action of trover, and the supreme court, without advert- ing to the form of action, gave judgment in their favor, this court reversed the judgment, although the plaintiff in error had neglected to urge that point upon the consideration of the su- preme court. In that case, the late Chancellor Kent says: "It does not come within the rule that an objection not taken in the court below, can not be taken here. That rule was intended only to be applied to objections which the party may be deemed, by his silence, to have waived, and which, when waived, still leave the merits of the case to rest with the judgment. But if the foundation of the action has manifestly failed, we can not, without shocking the common sense of justice, allow a recovery to stand."

It is a general rule, that a defendant may allege, in arrest of judgment, any matter appearing on the record which might be assigned for error after judgment: 12 Hen. IV. 24; Bro. Abr. tit. Judgment, pl. 48; 5 Com. Dig. 174, pleader, s. 47. So the de- fendant may move in arrest of judgment, although he has not appeared to the action: *Collins v. Gibbs*, 2 Burr. 899; *Chantflower v. Priestley*, Cro. Eliz. 914; 2 Roll. Abr. 716, c. 20; *Lilly's Pr. Reg.*, tit. Judgment, 121, a; *Bighton v. Sawles*, 1 Leon. 309. And I am not aware of any possible case in which there can be an error in the record or proceedings of the supreme court which would afford sufficient grounds for reversing their decision here, in which the party may not, if he applies in time, present the question directly to that court for their decision in the first in- stance. If he does so, and that court decide against him, it may then be proper for him to apply to this court to review that decision upon a writ of error. In the case before us, the alleged error in the finding of the jury appeared upon the face of the record. If it forms a sufficient ground for reversing the judg- ment, it would have been equally available by a motion in arrest. If the party had moved in arrest, and the supreme court had considered the objection well taken, that court would have awarded a *venire de novo*, to supply the defect, or have permitted the plaintiff to amend the verdict in such a manner as to cor- respond with the actual finding of the jury.

In conformity to the practice adopted by this court in *Colden v. Knickerbacker*, I think the writ of error in this cause should be dismissed, with costs. This being the unanimous opinion of the court, the writ of error was dismissed, with costs to be paid by the plaintiff in error.

INFANTS' LIABILITY FOR TORTS.—See, on this subject, *Word v. Vance*, 9 Am. Dec. 683, and note, and *Peigne v. Sutcliffe*, 17 Id. 756. The authority of the principal case on this point is recognized in *Hartfield v. Roper*, 21 Wend. 620; *Tift v. Tift*, 4 Denio, 177; *Robbins v. Mount*, 33 How. Pr. 32; S. C., 4 Rob. 561; *Fish v. Ferris*, 5 Duer, 50, and *Campbell v. Perkins*, 8 N. Y. 441. In the latter case, the court refer with approval to the doctrine that if a plaintiff declares in case against an infant bailee for an injury to the thing bailed, he thereby affirms the contract of hiring, and can not deprive the defendant of his plea of infancy.

PRACTICE ON WRITS OF ERROR.—The doctrine of the foregoing decision that error can not be assigned in the court of errors for any matter which was not actually considered by the supreme court, or presented for its consideration, is approved in *Noughton v. Starr*, 4 Wend. 179; *Davis v. Packard*, 6 Id. 334; S. C., 10 Id. 60; *Kane v. Whittick*, 8 Id. 229; *People v. White*, 24 Id. 544. In *Dorr v. Birge*, 8 Barb. 353; S. C., 5 How. Pr. 325; *Kanouse v. Martin*, 3 Sandf. 654; S. C., 8 N. Y. Leg. Obs. 159, it is held, on this principle, referring to *Campbell v. Stakes*, that a writ of error will not lie to the supreme court on a judgment by default, and if brought, that the proper course is neither to affirm nor to reverse the judgment, but to dismiss the writ. In *Payne v. Pacific M. S. Co.*, 1 Cal. 35, the distinction drawn in the above decision, between writs of error to superior and inferior courts, with reference to this point, is quoted with approval.

In *Beach v. Raritan, etc., R. R. Co.*, 37 N. Y. 468, the principal case is referred to as authority on the point that the hirer of a chattel can not excuse its non-return by showing its destruction while being used for a purpose to which the owner never consented.

COMBS v. JACKSON.

[2 WENDELL, 153.]

GUARDIAN IN SOCAGE.—At common law, where lands held in socage descended to an infant, his nearest relative, who could not possibly inherit the lands, was his guardian in socage until the age of fourteen, and until the selection of a guardian by himself, and might lawfully receive the rents and profits of the land.

IF THE LANDS DESCENDED FROM THE PATERNAL side, the mother or next of kin on the maternal side was the guardian; if from the maternal side, the father or next of kin on the paternal side was the guardian.

AS TO LANDS ACQUIRED BY PURCHASE, there could be no guardianship in socage.

LANDS GRANTED BY THE PEOPLE OF THIS STATE SINCE JULY 4, 1776, are declared by statute to be allodial and not feudal, and there can be no guardianship in socage with respect to them.

FATHER WAS GUARDIAN BY NATURE to his heir apparent, until his majority, at common law, where there was no guardian in socage; but his guardianship extended only to the person, and gave him no control over the property of the infant.

UNDER OUR STATUTE THE FATHER IS GUARDIAN BY NATURE of the persons of all his children, all of them being heirs apparent, and with respect to socage lands granted before the revolution, and descending from the maternal side, he is their guardian in socage as at common law.

ERROR to the supreme court, in an action of trespass for mesne profits for a certain lot in Ovid, in Seneca county. From the special verdict found in the case, it appeared that Smith, the lessor of the plaintiff, had recovered possession of said lot in an action of ejectment brought against the defendant, who was in possession, the demise being laid in March, 1819; that after said recovery, to wit, in August, 1824, the defendant surrendered possession, and that the plaintiff's lessor was an infant until March, 1824, when he attained his majority. The jury found the value of the rents and profits up to March, 1824, and afterwards until the surrender of possession; and that during the minority of the plaintiff's lessor, his father, claiming as his guardian by nature, had received said rents and profits, and that, if he had no right to do so, the plaintiff was entitled to recover two hundred and thirty dollars, otherwise only thirty dollars. Judgment on this verdict for two hundred and thirty dollars, to reverse which this writ of error was brought. The sole question was as to the right of the father to receive the rents and profits.

S. A. Foot, for the plaintiff in error, insisted that as guardian in socage, the father had a right to receive the rents and profits; citing, *Andrews*, 313; 5 *Johns*. 67; 2 *Kent. Com.* 182, 183; 1 *Leon.* 322; 1 *Bl. Com.* 461.

A. Gibbs, for the defendant in error, claimed that there was no proof that the land came to the infant lessor by descent, and, therefore, there could be no guardianship in socage; that, as guardian by nature, the father had no control over the infant's property or the income thereof: 1 *Johns. Ch.* 3; and that payment to him, therefore, was no bar to an action to recover the rents and profits: *Sherman v. Ballou*, 8 *Cow.* 304; 2 *Mass.* 55; 1 *Nott & McC.* 369.

The CHANCELLOR. At the common law, if lands held in socage came to an infant by descent, his nearest relative, who could not by any possibility inherit the lands, was his guardian in socage until the age of fourteen, and until the infant selected

a guardian for himself. Such guardian might lawfully receive the rents and profits of the land during the continuance of the guardianship. If the lands descended from the father or other paternal relatives, the mother, or next of kin on the part of the mother, was the guardian; and if the lands descended on the part of the mother, the father, or next of kin on the paternal side, was entitled to the guardianship: Litt., sec. 123. In *Quadring v. Dowers*, 2 Mod. 176,¹ it was held that there could be no guardianship in socage, where the infant acquired the lands by purchase and not by descent. In order to give the father the right to receive the rents and profits of the infant's lands in this case, the court must presume that those lands were not acquired by purchase, and that they descended to the infant on the part of the maternal relatives, and also that they are holden by socage tenure. By the act concerning tenures: 1 R. L. 70, all lands granted by the people of this state since the fourth of July, 1776, are declared to be allodial, and not feudal. This suit was brought to recover the rents and profits of part of lot No. 7, in the township of Quid, in the county of Seneca. Instead of presuming the tenure of these lands to be that [of] free and common socage, I think we must judicially notice the fact which appears from the public statute book, that this lot, as well as all the other lands in that county, belonged to the people of this state at the time of the declaration of independence, and were afterwards set apart by law, and granted to the troops in the line of this state, for military services during the revolution. There can be no guardianship in socage in relation to these lands. At the common law, where there was no guardian in socage, the father was guardian by nature to his heir apparent until the age of twenty-one. This was a guardianship of his person only, and gave the father no right or control over his property, real or personal: *May v. Calder*, 2 Mass. 55; *Genet v. Tullmudge*, 1 Johns. Ch. 3; Co. Lit. 84, a; *Dagley v. Tolbery*, 1 Eq. Cas. Abr. 300;² *Strickland v. Hudson*, 3 Rep. in Ch. 165.

This guardianship by nature was not incident to military tenures, and had no connection whatever with the lands of the infant. The guardian in chivalry was entitled to the possession and profits of the infant's lands, and the custody of his person in respect of the tenure. But the father's right by nature to the guardianship of the person of his son and heir

1. *Quadring v. Dowers*, 2 Mod. 176.

2. *Doyley v. Filberry*, 1 Eq. Cas. Abr. 300.

apparent, was paramount to the right of the guardian in chivalry; so that if the father was living, and lands held by the tenure of knight service descended to the infant son on the part of the mother, the lord was entitled to the wardship of the lands, but the father was entitled to the guardianship of his person: Co. Lit. 84, a. In this state, under our statute of descents, all the children are heirs apparent of the father, and he is entitled to the guardianship of their persons until the age of twenty-one years, or marriage, as guardian by nature, except in those cases where lands granted before the revolution descend to the children on the part of the maternal relations. By the statute of descents, lands thus acquired can not go to the father; and in relation to socage lands of that description, he may be the guardian in socage, and may take the rents and profits thereof for the use of his children until they attain the age of fourteen, and until another guardian be appointed: *Byrne v. Van Hoesen*, 5 Johns. 66. In the case before us, the father, as guardian by nature, had no control over the real or personal estate of his infant son, and the judgment of the supreme court should therefore be affirmed.

This being the unanimous opinion of the court, the judgment of the supreme court was thereupon affirmed, with costs.

THAT GUARDIAN IN SOCAGE, at common law, can only be the next of kin who can not, by any possibility, inherit, the principal case is cited in *Fonda v. Van Horne*, 15 Wend. 633; *Holmes v. Seely*, 17 Id. 77. The father, therefore, can not, in New York, be guardian in socage, since the inheritance may descend to him: *Fonda v. Van Horne*, 15 Wend. 633. That all lands in New York, granted by the people since July 4, 1776, are allodial, and not feudal, is held on the authority of *Combe v. Jackson*, in *Porter v. Bleiler*, 17 Barb. 151.

VARICK v. JACKSON.

[2 WENDELL, 166.]

POSSESSION AS EVIDENCE OF TITLE. — Possession of land for twenty-two years is sufficient evidence of ownership to enable one to recover in ejectment against a defendant who can not show a better title.

PARTY ELECTING TO CALL A WITNESS WHO IS INTERESTED ADVERSELY to him, for examination upon a particular point, admits his credibility, and the other party may examine him generally.

DISSEISIN IN FACT DIVESTS THE SEISIN of the original owner, and deprives him of all right in relation to the land, except the right of entry and of property, which may be further reduced to a mere right of action, and displaces all estates depending on the original seisin.

DISSEISIN BY RELATION is where the owner elects to consider himself disseised for the sake of the remedy by *novel disseisin*.

DISSEISIN IN FACT EXISTS ONLY where there is a wrongful entry by one claiming the freehold and an actual ouster of the true owner, or some act tantamount thereto, as by a common law conveyance with livery of seisin by one actually seised of an estate of freehold, or in lawful possession representing the freeholder, or by a common recovery and judgment for the freehold, with actual livery of seisin by the execution, or by levying a fine.

ONLY GRANTOR'S RIGHTS ARE DIVESTED BY CONVEYANCE which is not a common law conveyance with livery of seisin.

HOLDING OVER OF A TENANT FOR LIFE, after his estate is determined, under a claim of the fee, is not a disseisin of the true owner.

MERE ADVERSE POSSESSION, NOT AMOUNTING TO A DISSEISIN, does not prevent the owner from devising.

CHAMPERTY STATUTE DOES NOT APPLY TO DEVISES, judicial sales, or assignments under the insolvent act.

ERROR to the supreme court, in an action of ejectment for a certain lot in New York. At the trial at the circuit it appeared that Medcef Eden, sen., was in possession of the premises, personally or by his tenants, from 1782 or 1783, until his death in 1798, when he devised the same to his son Joseph, providing that in case of Joseph's death, the same should go to Medcef Eden, jun. The tenant in possession held under Joseph until 1802, when the latter rented to another. Joseph died, without issue, in 1813. Medcef Eden, jun., died in 1819, having devised all his property to his wife, one of the plaintiff's lessors, during widowhood, remainder to John Pelletreau for life, with certain trusts in favor of the testator's children. Wood, the other lessor of the plaintiff, became the assignee in insolvency of Medcef Eden, jun., in 1801. The defendants produced in evidence a deed of the premises from one Fine to John Bridgewater and wife, dated in 1767, under which grantees resided on the premises, as owners, until the evacuation of New York by the British. They produced, also, a mortgage of the lot from Bridgewater and wife to Sheffield Howard for one hundred pounds, dated in 1768, and an assignment of the same in 1783 by Howard to Medcef Eden, sen.; also, an assignment of the mortgage and bond, containing a release and conveyance of the assignor's estate and the premises to Joseph Winter, dated September 1, 1804, purporting to have been executed by the wife, and Joseph, and Medcef, jun., the sons of Medcef Eden, sen. The instrument was not executed by the widow. The signature of Medcef Eden, jun., was a forgery, but that of Joseph was genuine. The defendants further proved a deed from Winter, as assignee

under a foreclosure in 1805, a reconveyance to him, and a deed with full covenants from him to one Boyd, dated May 1, 1805, and sundry mesne conveyances from Boyd to Varick, one of the defendants. They also proved certain valuable improvements, by erecting buildings by Boyd after his purchase, and some expensive repairs by Varick. They produced in evidence, also, a bond, dated April 21, 1782, for one hundred and sixty-eight pounds, payable in one year, from Bridgewater to Eden, sen., with this indorsement signed by Bridgewater: "For the better securing this bond, the said John Bridgewater, gent., left the deeds of his house and land, to be returned when the moneys paid, or to be executed the same as a mortgage." John Pelletreau, the devisee in remainder of Medcef Eden, jun., whose name was signed as one of the subscribing witnesses to this bond, was called by the defendants to prove the same. He testified that his name was not in his handwriting. The plaintiff insisted on cross-examining him on the merits of the whole case, and was permitted to do so against the objection of the defendants, to which the latter excepted. The defendants also produced in evidence a deed dated July 17, 1804, from one Branson, the son of Mrs. Bridgewater, and who claimed to be her heir-at-law, to Joseph Winter. They also proved a sale of the premises on execution against Joseph Eden, and a sheriff's deed dated in 1801, which had been delivered to the plaintiff in execution, but had never been delivered to the grantees. The plaintiff, to rebut the presumption that Eden, sen., held as assignee of the said mortgage, proved that the said Eden said that he bought of Bridgewater, and paid him the money, and afterwards discovered a mortgage, which it cost him two hundred pounds to take up. At the close of the plaintiff's case, the defendants moved for a nonsuit, because it did not appear that Medcef Eden, jun., was seised, at the time of the devise or of his death, but the motion was overruled. The judge charged that the devise was good, notwithstanding the adverse possession of Varick, to which the defendants excepted. Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict, and a writ of error to reverse said judgment was brought.

S. Boyd and *A. Van Vechten*, for the plaintiffs in error, contended: 1. That the title of Medcef Eden, sen., at the time of making his will, was that of a mortgagee by virtue of the assignment from Howard, and possession for twenty years was necessary to raise a presumption of a foreclosure: 1 Johns. Ch.

335. For "once a mortgage, always a mortgage," and possession by the mortgagee could not affect the matter: 1 Johns. Ch. 30; 2 Id. 34. And the continuance of the possession by Joseph Eden did not help the plaintiff, because his possession was also under the mortgage, which he recognized as subsisting by assigning it, thus rebutting the presumption of payment: 9 Johns. 606. 2. That the estate of Eden, sen. was vested in Winter by the assignment. And even admitting that Joseph alone executed the assignment, he, as one of his father's executors, had full authority in relation to the delivery, sale, and release of the testator's goods, and his acts were binding on his co-executors: 3 Bac. Abr., tit. Ex'rs and Adm'rs, D; Rolfe Abr. 924; Com., tit. Adm'r, B, 12; Office of Executors, 95; Toller, 359; Dyer, 23, b; 2 Ves. sen. 267. And that the mortgage was foreclosed by a sale in 1805. 3. That possession having followed the assignment, and no claim thereto having been interposed by Medcef Eden, jun., from the time that his estate accrued, in 1813, until his death, six years afterwards, although the persons in possession were making valuable improvements, he had not interest in the premises that could be afterwards asserted by any one claiming under him (1 Johns. 592), or which could pass by his will. 4. That the devise by Medcef Eden, jun., was invalid, because the premises were in the adverse possession of another, and also on account of the statute against champerty: Gilb. Dev. 126, 134, 138, 145; Plowd. 485; Cruise Dig., tit. Dev. c. 3, pl. 28; 3 Com. Dig. 384, tit. Dev.; 1 Rob. on Wills, 261, n. 8; 11 Mod. 128; Fitzg. 230; 1 Mod. 217; 8 Ves. 283; 2 Vent. 340; 1 Johns. Cas. 33; 15 Johns. 343; 5 Johns. Ch. 545; 10 Mass. 131; 15 Id. 113; Fearne Cont. Rem. 537; 1 W. Bl. 221, 251; 2 Burr. 1131; 3 Co. 25; Poph. 89; 2 Lev. 108; Shep. Touch. 411; *Loine's case*, 10 Co., Co. Lit. sec. 287; 3 Burr. 1488; 1 Salk. 237; 3 Atk. 336; 2 Ball & B. 272; Cowp. 90, 217; 2 Bl. Com. 194, n., 241, 378; 2 Woodd. Lec. 348; 1 Ves. jun. 255; 8 East, 567; 1 Taunt. 604. 5. That the plaintiff ought not to have been permitted to examine Pelletreau on the merits, he being a party in interest; and the plaintiff having made him his own witness by his cross-examination, should not have been allowed to examine him any further than if he had called him himself: 2 Cai. 178; Dick. 382, 595, 650.

M. Van Buren and *A. Burr*, for the defendant in error, claimed: 1. That the possession of Eden, sen., as proved by the plaintiff, was sufficient evidence of ownership till a better title was shown. 2. That the devise by Medcef Eden, jun.,

was valid, because there was no actual disseisin, mere possession in another not constituting a disseisin; citing and discussing at length the authorities bearing on this question: 6 Johns. 217, 218, recognized in 5 Cow. 374; 1 Burr. 111; Co. Lit. sec. 279; 1 Co. 130; 2 Bl. Com. 171; Co. Lit. 372. 3. That even if there were disseisin in fact, the better opinion, founded on a critical examination of the authorities, is that the disseisee could devise though he could not grant; discussing at length the authorities cited by the counsel for the plaintiffs in error, and citing, also, *Anderson v. Jackson*, 16 Johns. 382 [8 Am. Dec. 330]; *Wilkes v. Lion*, 2 Cow. 333; *Jackson v. Waring*, 1 Pet. 570; *Doe v. Thompson*, 5 Cow. 371.

The CHANCELLOR. There was sufficient evidence in this case to warrant the jury in finding that the title to the premises in question was in Medcef Eden, the elder, at the time he made his will, and at the time of his death. He was in possession of the premises by his tenants, and claiming title thereto immediately after the revolution, and such possession was continued under him and his devisee until 1805. This was sufficient evidence of ownership to entitle the plaintiff in the court below to recover against any person who could not show a better title. The jury were also justified in finding that the mortgage was not a valid and subsisting incumbrance on the premises at the time it was assigned to Winter, in September, 1804. All these questions were properly submitted to the jury as matters of fact, and were passed upon them; they could not have found a verdict for the plaintiff in ejectment, without deciding that the alleged assignment of the mortgage to Winter was a forgery, so far as respected Medcef Eden, the younger, because that assignment also contained a valid conveyance of all his estate in the premises. If the jury erred on that subject, the remedy was by an application for a new trial; the party may still recover back the premises in a new action.

John Pelletreau was directly interested to have the lessors of the plaintiff recover, and, therefore, could not originally have been called by them as a witness; but being called and examined by the other party as to a particular fact, the court decided that he might be examined by the plaintiff's counsel generally. I am not aware of any case in which a party is compelled to call a person as a witness who is directly interested against him. If the subscribing witness to an instrument is interested at the trial, so that he can not be examined, secondary evidence may be admitted: *Swire v. Bell*, 5 T. R

371. It can not, therefore, be necessary for a party to call a witness who is interested against him, and in whose veracity he has no confidence. But if he elects to call such a witness, it is an admission of his credibility, and the other party may examine him generally. Cases may occur where suits are brought for distinct causes of action, in which a witness may be interested in one part of the controversy only, and not liable for the costs of either. It is the constant practice of the court of chancery, in such cases, to permit the person to be examined as to that part of the controversy in which he has no interest. If such a case should occur in a court of common law, such court probably would permit him to be sworn specially, on the application of a party who could not call him as a witness generally. The defendants in the ejectment having called Pelletreau to testify in relation to matters in which they knew his interest was against him, I think they were precluded from objecting to his examination by the other party.

But the principal question in this cause is as to the validity of the devise of Medcef Eden, the younger. Two kinds of disseisin are mentioned in the English law books. The one was a disseisin in fact, which actually changed and divested the seisin of the original owner of the freehold, and deprived him of all right in relation thereto, except the mere right of entry and of property; and which, under certain circumstances, was still further reduced to a mere right of action, the right of entry being lost. By this species of disseisin the wrong-doer acquired a fee-simple, and the actual seisin of the property, together with nearly all the rights of the real owner; and all estates depending on the original seisin were divested or displaced. The other kind of disseisin was called disseisin by election, because the owner might elect to consider himself disseised for the sake of the remedy by action of novel disseisin; but if he did not elect to consider himself disseised, the freehold was not divested, but still continued in him: *Blunden v. Baugh*, Cro. Car. 302.

Whether under the British statutes, since the abolition of military tenures, there is any disseisin which will deprive the owner of the property of the power of devising the same, is a question which does not arise under the facts of this case. The statute 34 and 35 Hen. VIII., c. 5, sec. 4, authorizes any person having a sole estate, or interest in fee-simple, of and in any manors, lands, tenements, rents, or other hereditaments in possession, reversion, or remainder, to devise the same. And

in *Goodright v. Forrester*, 8 East, 567, Lord Ellenborough appears to have put some stress on the words, in possession, reversion, or remainder, as words of restriction or limitation. Where the true owner is absolutely divested of his estate, and the same is vested in the disseisor by a disseisin in fact, according to the ancient doctrines of the feudal law, especially if the right of entry is taken away, so as to reduce the owner's claims to a mere right, it may not be correct to call it an estate or interest in possession, in the words of the British statute, although it is still a hereditament, and descendible. Our statute of wills provides "that any person having any estate of inheritance, either in severalty, in coparcenary, or in common, in any lands, tenements, or hereditaments, may, at his own free will and pleasure, give or devise the same," etc.: Sess. 36, c. 23, sec. 1. It is hardly possible, in broader and more explicit terms, to give a general power to dispose of any property, right, or interest in the real estate by will, whether the same is a vested freehold in possession of the testator or a mere descendible hereditament or interest therein, in respect to which he had only a right of entry, or a mere right of action. But as the legislature, in a late revision, have settled the rule of property as to all future devises, and being satisfied there was no actual disseisin of the estate of Medceff Eden, the younger, proved on the trial, I think it unnecessary for me to express any opinion as to the power of a disseisee to devise, either under the British statute of wills or our own. Disseisin in fact and disseisin by election have been so frequently confounded, that in examining the dicta of judges, it is sometimes difficult to understand to which species of disseisin they allude, without referring particularly to the facts of the case which they had under consideration at the time such dicta were delivered. But by a careful examination of the authorities, it will be found that there could be no disseisin in fact, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some other act which was tantamount, such as a common law conveyance, with livery of seisin, by a person actually seised of an estate of freehold in the premises; or some one lawfully in possession representing the freeholder: 1 Inst. 330, c, note 1; or by a common recovery, in which there was a judgment for the freehold, and an actual delivery of seisin by the execution, or by levying a fine, which is an acknowledgment of a feoffment of record. 2 Bl. Com. 348; Co. Lit. 33, c, note 1; *Doe v. Thompson*, 5 Cow. 371; *Smith v. Burtis*, 6 Johns.

197 [5 Am. Dec. 218]. In this case there was no expulsion of the tenant of the freehold, and Medcef Eden, the younger, did no act which could possibly be construed into an election to consider himself disseised.

When Boyd took possession of the premises in 1805, it was during the life of Joseph Eden, and, of course, before the happening of the contingency which afterwards divested the estate acquired under the conveyances of the first of September, 1804, and the first of May, 1805. By those conveyances Boyd acquired all the right of Joseph Eden, which was an estate in fee, subject, however, to be defeated by the death of Joseph without issue, during the life-time of Medcef. His entry, therefore, was congeable, and divested no estate. None of the conveyances, executed during the life of Joseph Eden, were common law conveyances, with livery of seisin, and, of course, divested no right but those of the grantors. By the death of Joseph Eden in 1813, the title vested in Medcef; and the holding over of the person in possession, after the termination of his estate in the premises, could not be a disseisin of the rightful owner. After that time, the rights of the parties were not altered previous to the death of Medcef Eden. There was then nothing to prevent the operation of his will, unless the bare holding over of a tenant for life, after the determination of his estate, and claiming the fee, can have that effect.

There is no case in the English books, where it has been holden that a mere adverse possession, not amounting to a disseisin, is sufficient to prevent the owner from devising. And in *Goodright v. Forrester*, 1 Taunt. 604, 613, Mansfield, C. J., doubts whether even a technical disseisin has that effect at the present day. So far as there is any authority on the subject in our own reports, it is in favor of the right to devise, notwithstanding a mere adverse possession: *Jackson v. Rodgers*, 1 Johns. C. 33;¹ and such, I believe, has been the general understanding of the profession in this state. The common opinion as to the effect of a technical or actual disseisin has probably been different. The statute against champerty has no application to this subject. That is only in affirmance of the common law. It superadds penalties, but does not alter the legal effect of the sale of a pretended title. The penalties inflicted by that statute are not applicable to the case of a deviser or devisee. Admitting the will to be in the nature of a conveyance, it could only take effect upon the death of the testator, when it would be too late to enforce the penalty

1. *Jackson v. Rogers*, 1 Johns. Cas. 53.

against him; and it would be a singular proceeding to attempt to punish the devisee for the act of a devisor. He may refuse to take a conveyance, but I am not aware that he can prevent the operation of an absolute devise, any more than heir-at-law can prevent a descent. Besides, such a construction of the statute might frequently cast the property, by descent, upon the person who was wrongfully withholding the possession from the true owner.

It has frequently been decided that judicial sales and assignments under the insolvent acts, or proceedings in bankruptcy, are not within the operation of that statute; and I can see no reasons why it should be applied to a devise, which are not equally applicable to such sales and assignments. There can be no danger that a man will devise his estate with a view to litigation, which can not take place till after his death. It is much more reasonable to suppose he would confess a judgment, and suffer the estate to be sold on execution for that purpose.

I think there is no error in the decision of the court, in the points excepted by the defendants below; and that the judgment of the supreme court should be affirmed.

This being the unanimous opinion of the court, the judgment of the supreme court was thereupon affirmed with costs.

THIS CAUSE WAS BEFORE THE COURTS OF NEW YORK on several subsequent occasions. In *Pelletreau v. Jackson*, 11 Wend. 120, which was the same case with the parties reversed, Nelson, J., seemed to dissent from the opinion above expressed by the chancellor, that the verdict of the jury in favor of the plaintiff necessarily included a finding, that the assignment to Winter was a forgery as respected Medcof Eden, jun. In *Edwards v. Varick*, 5 Denio, 668, it was said that the effect of that assignment as a conveyance by Medcof Eden, jun., was not at all in question in the principal case either in the supreme court or in the court of errors. In *Varick v. Edwards*, 1 Hoff. Ch. 417, reference is also made to the effect of the above decision. So in *Wright v. Methodist Episcopal Church*, Id. 225.

DISSEISIN, NATURE AND EFFECT OF.—In *McGregor v. Comstock*, 17 N. Y. 172, the doctrine of the principal case as to what constitutes disseisin in fact, and its effect, is approved. It is held in *McMahon v. Allen*, 12 Abb. Pr. 280; S. C., 34 Barb. 65, citing *Varick v. Jackson* as authority that a devise is good, notwithstanding an actual disseisin of the devisor.

COMPETENCY OF INTERESTED WITNESS.—The rule above laid down, that where a party calls a witness who is interested adversely to him, for examination on a particular point, he thereby waives all objection to his competency and credibility, and the other party may examine him on the case at large, is approved in *Bogert v. Bogert*, 2 Edw. Ch. 403; *Combs v. Bateman*,

10 Barb. 574; *Mattice v. Allen*, 33 Id. 546. In *Bank of Utica v. Mercers*, 3 Barb. Ch. 591, the principal case is referred to as an authority on this question, and it is held that an interested witness may be examined on that part of the case in which he has no interest, or in which he is interested adversely to the party calling him.

CHAMPERTY AND MAINTENANCE.—This subject is discussed in its various applications in the note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 316.

CASES
IN THE
SUPREME COURT
OF
OHIO.

STEELE v. LOWRY.

[4 OHIO, 72.]

DELIVERY OF TRUST DEED.—Where the grantee in a deed of trust agreed to accept the trust, and the deed was put on record pursuant to the directions of the grantor, the delivery was sufficient.

PROPERTY CONVEYED TO TRUSTEE FOR THE BENEFIT OF THE ISSUE of a contemplated marriage, and to be sold on the direction of the grantor, inures to the benefit of such issue, although the grantor die without directing the sale.

JUDGMENT IN REPLEVIN OBTAINED BY PARTY NOT THE OWNER OF THE PROPERTY.—Where, in a suit in replevin between two parties, neither of whom owned the property, judgment was rendered in favor of one of them, equity will compel an assignment of such judgment to the use of the real owner of the property.

BILL in chancery sent here for decision from Montgomery county. The principal object of the suit was to obtain a legal construction of a deed of trust to James Steele, made by Sophia Lowry, deceased, of whom the defendant Lowe was administrator. The deed in question, after reciting that the grantor, Sophia Cooper, had property, goods, etc., that came to her from her former husband, and that a marriage was intended between her and one Felding Lowry, witnesses, that she “gives and grants all her goods, rights, credits, etc., in trust, that the said James Steele shall sell and dispose of the same, whenever, in the opinion of the said Sophia, declared in writing, a reasonable price can be obtained for the same, and shall vest the proceeds in the purchase of lands within the state of Ohio, to be conveyed in fee-simple to the child or children of her, the said Sophia, to be by him, Lowry begotten, share and share alike; and in case the said Sophia shall die without issue, then to the

heirs of the said Sophia in fee." The marriage took place, and issue was born, to wit, Fielding Lowry, jun. Mrs. Lowry died in possession of the personal property mentioned in the deed, without having made any declaration. The defendant, Lowe, was appointed her administrator, and upon Lowry, sen., refusing to deliver the property to him, prosecuted a writ of replevin; and judgment was given against him, and in favor of Lowry, sen., for the full value of the property. The answer of Lowry, sen., denied that the trust deed was ever delivered to the complainant, but stated that it was left in the hands of the defendant, Lowry, sen., where it remained until the death of his wife. He claimed the property in his own right as having been reduced to his possession during the coverture, or in right of his infant son, issue of the marriage. From the testimony of the witness who drew the deed it appeared that Steele was not present when the deed was executed, but had agreed to be trustee. The grantor executed the deed and directed that it should be put on record, and delivered to the complainant.

Stoddart, for Lowry, sen., contended that the deed of trust had never been delivered.

Collett & Corwin, for Lowry, jun., argued that the deed of trust was intended as a provision for the issue of the intended marriage; and that this was evinced by the provision that in case of failure of such issue, the property should go to her general heirs: *Reeves* Dom. Rel. 182; *Jarman v. Wolloton*, 3 T. R. 618; *Osgood v. Strode*, 2 P. Wms. 255; *Howard v. Nutkin*, Id. 266; *Page v. Page*, Id. 489; *Brown v. Higgs*, 4 Ves. 708.

Crane, for the children of Cooper, contended that, as the grantor had never directed the whole to go to the issue of the marriage, it must be held to operate for the use of all her children.

By COURT. It is said that delivery is either actual, by doing something and saying nothing, or verbally, by saying something and doing nothing; or it may be by both. So a deed may be delivered by him who makes it, or by any person of his appointment or authority precedent, or assent, or agreement subsequent: *Shep. Touch.* 55. A deed delivered in trust for the grantee is sufficient: *Wheelwright v. Wheelwright*, 2 Mass. 447, 449 [3 Am. Dec. 66]. If a deed is read and not formerly delivered, but left in the same place, this is a delivery at law: *Skeleton's case*, Cro. Eliz. 6; Co. Lit. 360 (36, a). Here the

grantee had consented to accept the trust, and the grantor, with the knowledge, consent, and approbation of her intended husband, executed the deed, and directed it to be recorded and delivered. The testimony leaves no doubt of the delivery according to the strictest formalities of the common law: *Souveryby v. Arden*, 1 Johns. Ch. 240.

This deed passed the entire estate to the trustee, for the benefit of the issue of the intended marriage, and for want of issue, then to the heirs general of the grantor, reserving the use of the personal property, and a discretion in the donor as to the time of the sale of the estate. The reservation of power was to direct the sale whenever, in her opinion, a reasonable price could be obtained. The terms of the reservation would probably embrace the whole estate, both real and personal. The principal object was to turn the personal into real estate, for the proceeds were to be invested in lands in this state. This discretion was a mere division of the trusts for the more effectual security of the issue. Where there is a clear intention that a person shall take, and the mode only is left to the party, that is a trust which shall never fail by non-execution, or inability of the trustee to exercise it: *Brown v. Higgs*, 5 Ves. 495. It would be most unreasonable that the *cestui que use* should lose the whole estate, because the discretion of directing the time of sale was prevented by the death of the trustee. If the principle should be admitted that there was a resulting trust by the non-appointment of the grantor, the effect would be a distribution of the estate among the heirs general of Sophia Lowry, expressly contrary to her intention. She has declared in her deed this distribution shall not take place unless she should die without further issue.

The case of *Cook v. Brooking*, 2 Ves. 51,¹ was very much like the one under consideration. Mallock devised fifteen hundred pounds to S. and J. Snow, to be disposed of upon secret trusts, revealed to S. Snow, who declared in writing they should, of the profits, maintain the testator's daughter, Anne, then married, and in case she should survive her husband, she was to have the whole sum; but, in case she died in the life-time of her husband, then the fifteen hundred pounds were to go to his daughter L., in such shares and proportions as Anne should advise. Anne died in the life-time of her husband, and made no appointment. The court held that this was not a resulting trust, and distributed the money amongst the children of L.

1. *Cook v. Brooking*, 2 Vern. 50.

per stirpes. Whether we consult the obvious intention of the donor, or the principles of law applicable to the case, the result is the same, that here is no resulting trust to the heirs of Sophia Lowry, in consequence of her death, without declaring her opinion that the time had arrived when a reasonable price could be obtained for the property secured to the issue of the marriage. The complainant, therefore, as *cestui que trust* for the infant defendant, F. Lowry, jun., is entitled to the property, or its value, either from Lowry the elder, or the person who has obtained the possession of it from him.

But it appears from the pleadings that the defendant, Lowe, as administrator of the estate of Sophia Lowry, prosecuted an action of replevin against F. Lowry, sen., for the personal property mentioned in the deed of trust, and that, having failed to establish his right, judgment has been rendered against him for the sum of one thousand four hundred and thirty-six dollars and thirty-one cents, the value found by a jury under the provisions of the statute. The property belonged to neither of the parties to the suit, and yet the defendant has obtained a judgment for its full value. The law has either transferred that property to the plaintiff, which clearly does not belong to him, or there is a penalty at least to its full value for commencing a groundless action. This is a view of the statute not very favorable to its provisions, as a substitute for the writs, *de retorno habendo*, and of *withernam*. It is fortunately, perhaps, not now necessary to consider whether Lowe would be also answerable to the trustee for the property or its value, in case he elected to bring an action at law upon the tortious possession of the administrator. This court think that without violating any principle of equity, the judgment in favor of Lowry the elder can be taken as a trust fund for his infant son. This is upon the grounds that the judgment is more beneficial to the infant than the goods in specie. Lowe can not be aided in this court. This has already been determined in the case of *Lowe, administrator, v. F. Lowry, sen., et al.*, 4 Ohio, 77 [*post*, 585]. The proceedings in replevin have transferred to him the possession of the property, and charged him with the judgment. He must abide by this bitter law. But as that judgment is the proceeds of the infant's property, and as neither the plaintiff nor the defendant in the action had a shadow of legal right, equity requires that Lowry, sen., should transfer it to the *cestui que trust*, to be applied according to the declared intention of Sophia Lowry.

The court decree that F. Lowry, sen., assign the judgment recovered in the action of replevin against P. P. Lowe, except the costs, to the complainant, who is to collect the same in the name of Lowry, who is perpetually enjoined from interfering with the collection thereof, or from discharging or releasing the same, or the proceeds thereof. And as to the other defendants, the bill is to be dismissed. And it is further ordered and decreed that the costs of this suit be paid out of the proceeds of the judgment, and the residue be retained by the complainant for the further directions of this court.

It was decided in *Jones v. Jones*, 16 Am. Dec. 35, that a deed executed by the grantor, but retained in his possession, with directions to his wife to file it for record after his decease, was inoperative for want of delivery in the life-time of the grantor. See note to that case, for a discussion of the question of what constitutes delivery of a deed.

LOWE v. LOWRY.

[4 OHIO, 77.]

BILL OF PEACE WITH RESPECT TO PERSONALTY WILL NOT BE SUSTAINED, unless the complainant has established his title at law, or it is necessary to prevent a multiplicity of suits.

RELIEF FROM JUDGMENT AT LAW.—The fact that a plaintiff has prosecuted a groundless action at law, which involved him in a heavy responsibility, furnishes no ground for relief in equity.

BILL in chancery, adjourned for decision to this court from Montgomery county in connection with the preceding cause, (*Steele v. Lowry*), in which are stated the facts necessary to a clear understanding of the decision of the court in this case.

Lowe, for complainant.

Bacon, for defendant.

By Court. There is no equity in the bill upon which the complainant can be relieved. Its chief object, though somewhat dimly presented, is that of a bill of peace. But the subject-matter does not relate to real estate, and as to the personal, the complainant has established no right at law. This is deemed indispensable to sustain a bill of peace, unless an issue is necessary to bring in different interested parties, and thus prevent litigation and a multiplicity of suits: *Elridge v. Hill*, 2 Johns. Ch. 281; 2 Story Eq. Jur. sec. 859.

There seems to be no ground for relieving the complainant against the judgment at law, in the action of replevin. There

is no allegation that the complainant was ignorant of any material fact since discovered; no suggestion of fraud, accident, surprise, or mistake. No circumstance is charged in the bill to warrant a conclusion that the judgment at law is not according to the right of the case. On the contrary, we are satisfied, from another case which has been before us in connection with this, that the judgment against the complainant in replevin is unimpeachable. The facts that he prosecuted a groundless action, and that the result has involved him in a heavy responsibility, supply no grounds for his relief here. If the peculiar provisions of the statute regulating the proceedings in replevin operate hardly in a particular case, that circumstance invests the court with no power to relieve against them; *Rush v. Higgs*, 4 Ves. 639; 1 Story's Eq. Jur. sec. 544.

The injunction must be dissolved, and the bill dismissed, with costs.

HAINES' LESSEE v. LINDSEY.

[4 OHIO, 88.]

DEPUTY SHERIFF HAS POWER TO MAKE CONVEYANCES OF LANDS sold under execution.

WARRANT APPOINTING DEPUTY SHERIFF, IF FILED WITH THE CLERK, IS VALID, although not indorsed by him.

EJECTMENT. This case came before this court on a motion for a new trial, adjourned for decision from Clermont county. The defendant claimed title under a sheriff's deed, executed by the deputy sheriff, under a sale upon judgment and execution. At the trial the deed was rejected, and the defendant moved for a new trial.

Morris & Moorehead, for the motion.

Este, contra.

By Court. In the most ancient times of the English common law, the sheriff had his under-sheriff: 6 Com. Dig. 413. Such deputy, when appointed, was vested with authority to perform every ministerial act that the principal sheriff could perform. The power given the principal sheriff by our statute is but in affirmance of the common law; and we think that upon just principles of analogy, the power to make conveyances of lands sold under execution may be legitimately exercised by the deputy. The writ of *elegit* in England directed the sheriff to hold an inquisition upon the debtor's lands, and according to the

finding of that inquisition, set off to the plaintiff in execution a certain portion of those lands, to be held at an annual rent until the debt is paid. The inquisition and sheriff's return upon the writ are the evidence of the creditor's right to the possession of the lands. It has been adjudged, not only that a deputy sheriff may take an inquisition and make an extent upon *elegit*, but that the bailiff of a liberty may do it by warrant under him: Cro. Car. 319.

In our state, the order of the court confirming the sale, and the sheriff's deed in conformity with that order, are essential items of proof to sustain the purchaser's title. And there is certainly nothing but what is strictly ministerial in executing the deed, when the court, acting judicially, have confirmed the sale. Holding an inquisition upon *elegit* bears a much stronger semblance of exercising a judicial authority. In New York, it is settled that an inquisition of damages may be held by the deputy sheriff: *Tillotson v. Cheetham*, 2 Johns. 63. The very question presented in this case has been directly decided in that state, and the validity of a sheriff's deed, executed by a deputy, sustained: *Jackson v. Bush*, 10 Johns. 223; *Gorham v. Gale*, 7 Cow. 737, 739 [17 Am. Dec. 549.] The statute of New York authorizes the sheriff, "by writing under his hand and seal, to make some proper person under-sheriff," etc. It directs that "such be recorded in the office of the clerk of the county;" but it does not define what shall be the powers of the deputy in the life of the principal. In case of his death, it declares "the deputy shall in all things execute the office of sheriff of the same county." Our statute is much stronger than this, for it directs that the warrant appointing the deputy shall authorize him "to perform all and singular the duties appertaining to the office of sheriff within his respective county." These duties he may perform in the life of the sheriff, and as the execution of the deed after a sale of real estate is one of them, we consider the authority as vested in the deputy by express terms.

In this case, an exception is taken that the warrant constituting the deputy has not been filed agreeably to the provision of our statute. It appears to have passed through the proper office before it was placed with the papers in this cause. There is no further evidence that it was filed. In our practice, the ordinary evidence that a paper has been officially filed is the clerk's indorsement of that fact upon the back of it. But we are not prepared to say that it can not be filed unless thus indorsed, or that no other evidence than the indorsement can be

received to establish the fact of filing. It would be especially dangerous to suspend the validity of titles to land upon any practice of a ministerial officer, regulated by no positive law, and not so supported by usage and precedent as to constitute an unbending rule. The exact time when a paper is placed upon file frequently is very material to rights arising under it; and, for this reason, the practice of indorsing the fact and the date upon the paper itself, meets the entire approbation of the court. Still had the paper been placed in the office, either strung upon a thread, or laid in a drawer or pigeon-hole, we conceive it would be filed within the terms of the law. The fact of filing it is to be regarded as a matter *in pais*, seeing there is no law directing it to be made matter of record. In the absence of all testimony with regard to the paper, except that it had been in the clerk's office before it was used in the cause before us, we feel bound to presume that it was regularly filed. If the deputy deposited his warrant of deputation with the clerk, and that officer omitted to file it, we are not satisfied that the power of the deputy should be deemed void upon that account: *Marbury v. Madison*, 1 Cranch, 141; 1 Peter's Cond. R. 269. But it is not necessary now to express an opinion on this point.

The verdict must be set aside and a new trial granted; the costs to abide the event of this suit.

Either the sheriff or his deputy may execute a deed on a sale on execution: *Gorham v. Gale*, 17 Am. Dec. 549: "The execution of a conveyance is a mere ministerial act. Hence, it may be done by a deputy, acting in the name of his principal. The power of sheriffs to appoint under and deputy sheriffs seems always to have been conceded; and whenever a person has been appointed an under or deputy sheriff in such mode as is regarded as valid by the laws of his state, he has full authority to execute conveyances in the name of his principal, though his appointment was made by parol only: *Freeman on Executions*, sec. 327.

GOFORTH v. LONGWORTH.

[4 OHIO, 129.]

ADMINISTRATOR'S SALE OF REAL ESTATE.—An administrator's sale of the real estate of a decedent is void unless made by virtue of an order of court; and the existence of such an order must appear as a matter of record, and can not be proven in any other way.

EJECTMENT, adjourned for decision from Hamilton county. The plaintiff claimed as heir at law of Aaron Goforth, who died seised of the lot of land in question. The seisin of the ancestor

and the heirship of the plaintiff were admitted. The defendant claimed under an alleged sale and conveyance by the administrator of Goforth of the lot for the payment of debts. He gave in evidence a deed from the administrators which recited that the sale was made under an order of court. And to sustain this deed he gave in evidence an order of court in these words: "Petition and motion made by the administrators of A. Goforth, deceased, for the sale of real estate. Account or statement exhibited to court, who appoint Joseph Carpenter, Ethan Stone, and Richard Fosdick, appraisers," etc. An appraisement of the real estate was returned by these appraisers, dated December 11, 1813. An account of sale was made by the administrators, dated December 15, 1813, in which the lot in question was set down as sold on the fourteenth of December, 1813. This account was marked filed as of the fourteenth of April, 1814. No other orders of court were given in evidence.

Caswell & Starr, for the plaintiff.

Wright, for the defendant.

By COURT. It is now well settled that courts give a liberal construction to statutes authorizing sales of real estate by executors or administrators. Public policy requires that all reasonable presumptions should be made in support of such sales, especially respecting matters *in pais* [*Ludlow v. Wade*, 5 Ohio, 500]. The number of titles thus derived, and the too frequent inaccuracy of clerks, and others, concerned in effecting these sales, render this necessary. But where the statute is explicit and unambiguous in its terms, the court is not authorized to dispense with the formalities and modes of proceeding prescribed, or to supply them by presumptions and constructions.

The sale relied upon by the defendant was made under the statute of February 10, 1810: Chase, 680. The thirty-second section provides, "that when it shall be made appear to the satisfaction of the court that it is necessary to sell real property for the discharge of debts, as specified in the preceding section, they shall appoint three disinterested men to view the lands, tenements, or hereditaments so to be sold, and return to court, under oath, a statement of the value thereof, after which the court shall direct the executor or executors, administrator or administrators, to proceed to sell either the whole or a part, as they may think proper, of such real estate, after giving notice," etc. [*Miami Ex. Co. v. Halley*, 7 Ohio, 13]. The provisions here cited require that certain acts shall be done by the

court of common pleas, and these constitute the foundation upon which the sale of a deceased person's real estate, by his personal representative, must rest. That these acts were done by the court must be evidenced by the record of their proceedings. The law requires that the court shall appoint valuers, who shall value the estate, and make a return of the valuation, "after which the court shall direct" the whole or a part to be sold, "as they may think proper." This act to be performed by the court is essentially of a judicial character. A judgment is to be made up and pronounced, and this judgment is the foundation of the administrator's or executor's power to sell [*Ludlow v. Wade*, 5 Ohio, 501]. Were such a judgment, order, or direction produced, it would be correct to infer that it was rendered or made upon a proper state of facts. The appointment and return of the valuers, with other preliminary proceedings, might be inferred or presumed. But the judgment or direction stands upon a different principle. It can only exist as matter of record, and can in no other mode be proven. No transcript of any such record is produced, nor anything more than the order appointing the valuers, which, in the nature of things, preceded the direction or order to sell, because between that appointment and the final direction to sell, the valuers were to perform the duties required of them by law.

The counsel, aware of the necessity of adducing record evidence of this order or judgment, attempt to deduce it from the "*et cetera*" at the end of the order appointing valuers. But such an interpretation of the "*et cetera*" in the case before us is wholly inadmissible. Lord Coke himself, whose commentary upon the "*et cetera*" of Littleton is a standing jest with the profession, never could have thought that matter subsequent, and the final decision of the court in the case, could be included in an "*et cetera*" attached to the incipient order in the proceedings. The statutory provisions in respect to cases of sales of real estate by the personal representative are intended to protect the interests of heirs and creditors, as well as that of purchasers. The power of the personal representative over the real estate of the deceased is derivative and limited. It is derived from the act of the court, in conformity of the law. The discretion of the court must be exercised and declared upon the subject, and without this, the act of the administrator or executor is void, because based upon no legal foundation. It is a case of acting under a power, when no power is conferred. The

act must therefore be void. In this case there is the proper proof that valuers were appointed, and made a return.

These steps prepared the subject for the court to act upon finally. But there is no evidence that they did finally act upon it. On the contrary, there are facts stated that warrant a contrary conclusion. The appraisement is dated December 11, 1813, and the administrators report the sale as made the fourteenth of the same month. In this period of time, it was impossible for the court to act, and then for the administrator to give the legal notice of sale. It seems, therefore, to be an almost necessary conclusion, that the administrators did not consider an order or direction to sell, founded upon the return of the valuers, as necessary to invest them with the power to effect a sale. We can not otherwise account for their appointing and advertising a sale, even before the valuation was made, and, of consequence, before any power to sell could be vested in them. They mistook their duty and their powers. We might as well attempt to sustain a sheriff's deed for land sold, on execution, where the pleadings were found, but no judgment, as to sustain the sale by the administrators, in this case. To divest the heirs of their estate, by the sale of the personal representative, that sale must be made in substantial compliance with the statute. This must appear in the record, or arise on a just implication from it. Here we have neither.

The judgment must be for the plaintiff.

Cited with approval to the point that no order for a sale could be made, until the appraisal was first made and returned, in *Miami Ez. Co. v. Halley*, 7 Ohio, 11.

BIGELOW'S EXECUTOR v. BIGELOW'S ADM'RS.

[4 OHIO, 138.]

BOND OF OBLIGOR WHO BECOMES ADMINISTRATOR OF THE OBLIGEE is thereby suspended, and the debt becomes assets in his hands as administrator.

DISCOVERY OF WILL AND APPOINTMENT OF EXECUTOR repeal grant of administration, but do not avoid all mesne acts.

DECREE OF COURT OF COMPETENT JURISDICTION can not be impeached collaterally.

COVENANT, adjourned for decision from the county of Licking. Oliver Bigelow, in his life-time, sold to Elihu Bigelow a tract of land, and written covenants were entered into between them to the effect that Elihu should pay the purchase price in yearly installments of two hundred dollars each, and upon payment of

the whole, that Oliver should convey the land to Elihu. Several payments were made and indorsed in the life-time of Oliver. But before the contract was completed Oliver died and Elihu was appointed his administrator. In his administration account he represented that there was due on the contract the sum of one hundred and eighty dollars. While he was acting as administrator Elihu petitioned the court, under the statute, to complete the contract by ordering a conveyance, and stated in this petition that the whole of the purchase-money had been paid. On the death of Elihu the defendants were appointed his administrators. It was discovered that Oliver had left a will appointing the plaintiff his executor, who proved the will and took out letters. Having, by some means, obtained possession of the contract, he instituted this suit. The jury, by a special verdict, found that there was due upon the contract to the estate of Oliver Bigelow the sum of three hundred and nine dollars and sixty cents; and that the writing was obtained by the plaintiff without the consent of Elihu Bigelow, or his administrators.

Stanberry, for the plaintiff, contended that as Elihu was not appointed by the deceased, the fact of his having taken the administration on himself did not extinguish the debt, but merely suspended the right to sue, which right to sue immediately accrued to the executor, as soon as the bond came into his possession. He also contended that the fact found by the special verdict could not be controverted by the decree of the court, made on the petition of Elihu for a deed, which decree had never been carried into effect.

Dille, for the defendants, contended that the bond, on the appointment of Elihu Bigelow as administrator, merged and became so much assets in his hands as administrator.

By Court. The first question made is, whether the appointment of a debtor administrator extinguishes the debt, and co-instate turns it into assets; 2. If the debt is only suspended, whether the application for a deed by the administrator to himself, as obligor, and an order granted, destroy the right of action on the bond.

In this case, it appears that during the life-time of Oliver and Elihu Bigelow, they entered into articles of agreement, by which Oliver covenanted, upon the payment of a certain sum of money by Elihu, to execute a conveyance for a tract of land, therein specified. A part of the money was paid in the life-time

of Oliver. Administration on his estate was granted to his brother Elihu. It is now a well-settled principle, that if a creditor make his debtor executor, it is not absolutely an extinguishment of the debt, but remains as assets in his hands: *Dorchester v. Webb*, Cro. Car. 372. It is, however, quasi a release at law, because he can not be sued; 1 Com. Dig. 337. The same rule must apply to administrators, who can not sue themselves any more than executors. Both are trustees; the one under the law, the other by the appointment of the testator. In the principal case, a will was discovered and admitted to probate, and the administrator was superseded by the executor. Counsel suppose the debt or duty was only suspended, while the debtor was acting as administrator, and that a right of action immediately accrued to the executor when the bond came into his possession. The law appears to be otherwise. Personal actions once suspended are always suspended: *Dorchester v. Webb*, Cro. Car. 372. If the bond was once assets, no act of the parties could turn them back to an obligation. Chief Baron Comyns, who is himself said to be an authority, has recognized the principle as a sound one, that a personal thing suspended is extinct: 1 Com. Dig. 337. The principle under consideration was decided in *Winchop v. Bass et al.*, 12 Mass. 199; the court say: "The executor having voluntarily assumed the trust, which prevents any one from suing, and being unable to sue himself, he shall be considered as having paid the debt, and as holding the amount in his hands as administrator. By the same case, securities in the bond were considered accountable for such assets. The discovery of a will, and the appointment of an executor, only operate as a repeal of the grant of administration, which did not avoid all mesne acts. A repeal upon citation, although the goods were sold *pendente lite*, does not render the act void: Cro. Eliz. 459; Salk. 38. Consequently the application, on the part of the administrator, to have the contract specifically executed, and the record of proceedings under it, are not rendered void by the discovery of a will, and the appointment of an executor, who accepted the trust. Every act of the administrator has the same validity as if he had not been superseded, but had continued to perform his duties until final settlement and distribution of the estate.

But the record of the proceedings upon the petition of the administrator for a deed, is conclusive against the right of recovery in this action. The court had jurisdiction, and have found the payment of the money, which can not be con-

troverted, unless this order or decree is void, and this is not pretended, it being a solemn judgment of a court of competent jurisdiction, is no longer open for controversy. The decree can not be open for inquiry whether the obligee made payment or not. The court has already adjudged that, and the record shows it. A judgment of the law is not to be controverted by collateral matters, for they are intended: 6 Co. 38; *Perkins v. Fairfield*, 11 Mass. 227; *Jackson ex dem. Goforth v. Longworth*, 4 Ohio, 129 [*ante*, 588]. We can not, in this collateral way, go into an inquiry concerning the propriety or impropriety of extending the equity of the statute to an obligee who is administrator. The policy of admitting a trustee of the law to make this application, where his personal interest must come in conflict with his representative duties, would, as an abstract principle, be very questionable; but the decision has been made, and in this action can not be controverted. The legal maxim, "*Ex diuturnitate temporis omnia præsumuntur rite et solemniter esse acta, donec probitur in contrarium*," applies with force to this as well as to every other record: Greenl. Ev. 23. The court are of opinion that the facts agreed are conclusive against the plaintiff's right of recovery upon this bond. Circumstances may exist, which enable the heir, or creditor, to be relieved against the effect of this order, or decree, by applying to a different jurisdiction.

Judgment of nonsuit.

Cited and approved in *Hall v. Pratt*, 5 Ohio, 72, to the point that the debt of an administrator due to the estate becomes, upon his appointment, assets in his hands belonging to the estate, and no action can be maintained thereafter against him on the original debt. Cited to the same point and explained in *Collard v. Donaldson*, 17 Id. 264. Cited and commented on at some length in *Roseman v. McFarland*, 9 Ohio St. 369, in which case the court say, "The authority of this case is somewhat shaken, and its practical application limited" in the cases of *Hall v. Pratt* and *Collard v. Donaldson*, *supra*. In the case of *Roseman v. McFarland* it was held that the principle decided in *Bigelow v. Bigelow* does not apply to cases of joint and several notes, where only one of the makers becomes trustee to a payee.

Collateral attacks on judgments of courts of competent jurisdiction are not permitted: *Dufour v. Camfranc*, 13 Am. Dec. 360, and note, 365; *Van Dyke v. Johns*, 12 Id. 76; *Homer v. Fish*, 11 Id. 218; *Moore v. Tanner*, 17 Id. 35.

OLIVER v. PRAY.

[4 OHIO, 175.]

EQUITY JURISDICTION—DEFECTIVE APPEAL—NEW TRIAL.—Where a party fails to give a sufficient bond on appeal, owing to the mistake or omission of the clerk who took it, and the supreme court for that reason quashes the appeal, equity will, on the appellant's showing probable ground that he had a case at law, grant a new trial; and such case may be retained and tried in the supreme court.

BILL in chancery, adjourned for decision from Wood county. The bill showed that, in 1827, Pray sued the complainants, Oliver and Baum, in Wood county, but the former only was served with process. The declaration in that action set forth a special contract made between the complainants, by their attorney in fact, Peter G. Oliver, and Pray, whereby it was alleged that they sold to Pray, in 1819, certain lands therein described for a certain sum of money, part of which was to be paid down, and the balance in three equal annual payments; deed to be made on the completion of the payments. That Pray had paid in full, but complainant refused to convey, and had allowed the lands to be forfeited to the United States. It also contained general counts for lands sold to which title had failed, and for money had and received. Oliver pleaded the general issue, and, in 1828, a verdict and judgment were given against him. Due notice of appeal was given, and Oliver, who was not present at the trial, as soon as he was informed of the judgment, went to Wood county to perfect the appeal. The clerk, on the request of Oliver, drew up the appeal bond, which was executed by him and his sureties, and approved and accepted by the clerk. Oliver verily believed that the bond was duly executed, and the case duly appealed. At the time of the execution of the bond the costs had not been taxed, and a blank was left for their insertion, which the clerk, by accident or mistake, omitted to fill up. At the next term of the supreme court in Wood county, the appeal was quashed, on motion of Pray, on the sole ground that the costs had not been inserted in the appeal bond, and execution issued forthwith.

The bill alleged that the verdict and judgment were wholly unjust, and that neither of the complainants owed Pray one cent; that they never made or authorized any such contract as that set forth in the declaration; that Peter G. Oliver was never authorized by them to make any such contract; that neither of the complainants ever received one cent for the lands men-

tioned; and that the verdict was obtained by the fraud, contrivance, and management of Pray, his agents, and abettors; that the complainants had a just and equitable defense in the suit at law, which was set out as follows:

In 1817, complainants and others formed an association to purchase public lands, and in that year purchased, among others, the lands in question. Complainant, Oliver, was constituted the agent of the company, purchased the lands, laid off the lots, and held the certificates as trustee for the company. In 1818 he closed all his accounts with the company, and transferred all the certificates to Baum, the other complainant, who was constituted trustee in his stead. In 1819, and prior to the date of Pray's contract, Oliver sold all his interest in the company to others, and has had, since that time, no interest, directly or indirectly, in the concern. In 1818, Oliver, in order to assist his brother, Peter G. Oliver, who was young and inexperienced, and who had been somewhat unfortunate, effected an arrangement by which Peter G. took a tavern of the company's in Maumee, and for the rent thereof was to collect rents for the company, protect their lands, and superintend improvements; but he had no authority whatever, written or verbal, to sell the lands of the company, and had never pretended to sell any of their lands except those in controversy. In 1819, Pray applied to Peter G. to purchase these lands, who informed him that he had no authority to sell them, but that he would write to the company in reference to the matter. He received for answer that the company would not sell. Pray, however, revived his application, and by crafty representations induced Peter G. to enter into a contract for the sale of the lands, well knowing that he had no authority to sell, but relying on complainant Oliver's friendship for his brother, to relieve him from the difficulty in which he would become involved by making the contract. Accordingly, Peter G. entered into a contract, under seal, as agent for Baum, for the sale of the lands to Pray. This contract was not made known to either of the complainants, or to any of the company.

After the sale, Peter G. wrote to the company, informing them that certain prices had been offered, but saying nothing of the sale. They answered, stating the prices they would take for the lands, but as they heard nothing more of the matter they supposed that the negotiation had been abandoned. In 1821, owing to the pressure of the times, the company were unable to clear all their lands out of office, and took the benefit of

the act of congress for consolidating, in which they relinquished to the United States the lands in question, being still ignorant of Pray's claim. The first information that complainants or the company had of Pray's contract or claim was obtained in 1822. Complainant, Oliver, then advised Peter G. to bid in the lands at the resales, and, out of kindness to his brother, offered to assist him if it should be in his power, in order to relieve him from the unpleasant situation in which he had placed himself. Pray did not, at that time, pretend to have any claim on complainants or the company, but, on the contrary, told complainant Oliver that he had made arrangements with Peter G. to bid in the lands at the resales. About the time of the contract, Pray craftily induced Peter G. to join him in erecting a mill on a part of the land, and so managed that a great part of the first three installments were put into this mill, and neither of the complainants, nor any of the company, ever was paid any part of the purchase money.

In 1822, Pray induced Peter G. to accept his notes in payment of the last installment, and to indorse on the contract a receipt of payment in full. Peter G., or his assignee, afterwards sued Pray on these notes, and Pray set up in defense that the consideration had failed, and that Peter G. had no authority to sell, and on this defense succeeded in obtaining judgment. Still the judgment in this case includes the last installment, or a great part of it. The lands were resold in 1827. Pray and the complainants were present at the sales, but Peter G. was insolvent and had removed to Alabama. Pray did not then pretend that either of the complainants was under obligation to buy in the lands for him; but on the contrary, he requested them not to bid against him, which request complainant complied with, not because he was under any legal, equitable, or moral obligation so to do, but because he was unwilling that any one should suffer from the improper conduct of his brother, Peter G. The lands were purchased by Pray. The bill prayed for a new trial at law, and for a perpetual injunction and final settlement of the case in chancery.

The answer admitted the existence of the association of Baum and others as a land company; and that, in 1819, Peter G. Oliver informed Pray that he was not authorized to contract for the sale of the company's lands. All the other allegations were directly or evasively denied. The testimony taken presented strong probable grounds in support of the defense against the action at law.

Wilcox and Hammond, for the complainants, contended that the court had jurisdiction of the case made in the bill, and that after answering the merits in issue it was too late for the defendant to raise this question: *Rees v. Smith*, 1 Ohio, 126 [13 Am. Dec. 599]; Gilbert's Chancery, 219. Accident and mistake are peculiar provinces of a court of equity, and it will be difficult to find any case where relief has been refused, if the accident or mistake be clearly proved: *Hunt v. Rousmanier*, 8 Wheat. 174; 2 Kent's Com. 491; 1 Story's Eq. 110, 183.

Ewing and Powell, for the defendant, contended that complainants were not entitled to a new trial, but that the proper relief to ask for was that the bond should be set up in equity, and the appeal perfected; but they did not show themselves to be entitled even to that relief: *Simpson v. Vaughan*, 2 Atk. 33; *Hunt v. Rousmanier*, 8 Wheat. 174, 217.

It was the duty of the complainant to execute the bond and see to its sufficiency. He had no right to rely on the clerk; he ought to have consulted his counsel, and not having done so, he ought to bear the consequences of his neglect: *Dodge v. Strong*, 2 Johns. Ch. 228; 2 Story's Eq. 895; *Simpson v. Bateman*, 1 Sch. and Lef. 201.

By Court, SWAN, J. The principal question is, whether a court of chancery has jurisdiction of the case, as made by the bill. The question, in this respect, is important, and has received the full consideration of the court.

The statute of February 18, 1824, vol. 24, p. 72; Chase, 1276, sec. 99, allows an appeal to the supreme court, of course, from any judgment, or decree rendered, in the common pleas, in which such court had original jurisdiction; and the party desirous of appealing, shall, at the term of the court of common pleas at which the judgment or decree was rendered, enter on the records of the court notice of such his intention, and within thirty days after the rising of the court, shall enter into bond to the adverse party, with one or more good and sufficient securities, to be approved of by the clerk, in double the amount of the judgment or decree rendered, etc. The appeal bond in this case was taken in double the amount of the judgment, exclusive of costs.

On motion of the respondent, the supreme court quashed the appeal, upon the ground that the bond was not executed in conformity with the provisions of the statute. The amount of the penalty was supposed to be matter of positive law, and one

of the requisites upon which the appellate jurisdiction of the court depends. To effect an appeal the provisions of the statute, no doubt, must be substantially complied with. It can not be done without the notice is entered of record, at the term in which the judgment or decree was rendered. So the appeal must fail, if the bond should not be executed within the time prescribed by the act, and it has been several times decided that the penalty of the bond must be in double the amount of the judgment or decree, including the costs. The party has his right of appeal, upon complying with the conditions annexed by the statute. His right is lost by omitting or neglecting to perform any of the conditions, and the appellate jurisdiction of this court altogether ceases over the cause. With regard to notice and filing the bond within thirty days after the rising of the court, the decisions have been uniform, that the omission, in either case, ousts this court of its jurisdiction. It is undoubtedly within the powers of the legislature to attach all reasonable conditions to the right of appeal, and thus place a limitation upon the appellate jurisdiction of this court.

The cause is not appealed without the party performs the conditions required by statute, and when he neglects to do so, to entertain jurisdiction would be mere usurpation of power; but the objection comes too late, to the correctness of the decision, in dismissing the appeal. The party complaining of the injury is fixed with the judgment of the court of common pleas, and the common law can afford him no remedy. This is the case, whether the dismissal of the appeal was justified by a correct interpretation of the law or not. The injury, if any, to the complainants, has originated with the clerk who prepared the bond, or with the appellant who executed it. Uniform practice has fixed the drafting of these bonds upon the clerks. Their offices are usually furnished with blanks for the purpose. The bill and evidence show conclusively that the bond was, in good faith, prepared by the clerk, and, in good faith, executed by the principal obligor. By mere mistake, or misapprehension in both, the costs were not doubled with the judgment, and inserted as the penalty. Doubts as to the necessity of adding the costs, in the penalty of the bond, have existed with the bar. Even some of the judges have not been without them. This is a mistake, then, which a plain man, acting in perfect good faith, might naturally commit upon the most careful examination of the law, and using every effort to comply with its provisions. No fault or negligence can be imputed to the party seeking to

resist the plaintiff's claim in the appellate court. The record shows most satisfactorily that Oliver honestly believed he had a meritorious defense to the action. In no part of the proceedings does it appear that he was using the court of common pleas merely to ascertain the strength of his adversary. The cause was submitted to the jury in his absence, and there are circumstances disclosed, by the evidence and exhibits, which show an effort, on the part of the present defendant, to prevent the appellant from obtaining security to acceptance of the clerk, not very consistent with the idea that the judgment was fairly recovered and justly due; but although this may cast a shade of suspicion over the fairness of the judgment, it does not lay the foundation of chancery jurisdiction. From the nature of society, it is difficult, if not impossible, to embrace the powers of a court of chancery in a general definition. Peculiar and extraordinary cases will arise in the complex and diversified affairs of men, which, perhaps, can not be classed under any of the distinct heads of chancery jurisdiction, but which must be acknowledged, nevertheless, to come within the legitimate powers of the chancellor, because complete justice can not otherwise be done between the parties. Of this character is the case of *Ray v. The Duke of Beaufort*, 3 Atk. 191.¹ In that case Lord Hardwicke makes some remark quite applicable to the case under consideration. "It frequently happens there may be a just cause of action, yet the real motives may be very unjust, which a court of equity will always take into consideration, though they can not, at law, pay any regard to it."

The following cases show that courts of equity go far to prevent injustice, when no remedy exists at law: *Countess of Gainsborough v. Gifford*, 2 P. Wms. 425; *Hunt v. Rousmanier's Adm'r*, 8 Wheat. 174. Further authorities are collected in a note to 3 Desau. 325. This reference wants accuracy, but some of the cases go far to justify the remark "that courts of equity will give relief in all cases not of a criminal nature, of fraud, surprise, or extraordinary cases, when complete justice has not been done, and in many cases upon principles of general policy." Anciently, courts of equity exercised jurisdiction in granting new trials in cases of manifest injustice, or when testimony had been newly discovered. The practice went out of use when courts of law became more liberal in granting new trials.

In *Floyd v. Jayne*, Johns. Ch. 479,² Chancellor Kent says: "The present case seems to prove an exception to the modern

1. *Ray v. Duke of Beaufort*, 2 Atk. 190.

2. 6 Johns. Ch. 479.

rule, and to require of this court the exercise of that ancient jurisdiction, because here is a case in which the court of law has no power to award a new trial upon the merits." The case at bar is within the principle and reason of the one last cited. The defective statutory bond was executed after the term, when it was neither in the power of the party to apply for, or of the court to grant, a new trial. It is a case within the exception of the modern rule, and the court is, therefore, permitted, upon the justest principles, to resort to "its ancient jurisdiction." This court considers this as an extraordinary case, in which the injured party has no redress if a court of equity has no jurisdiction. Great injustice may follow, especially to the complainant, Oliver, should the judgment of the court of common pleas conclude the parties. From the peculiar circumstances of this case, and to prevent that injustice which may otherwise take place, this court believes no sound principle is violated by entertaining jurisdiction of this cause.

But it is not enough that the court has jurisdiction of the subject-matter. We must be satisfied that the complainants have some merits, some grounds of defense to the action at law, before the judgment will be set aside. It is not enough that the party has lost the naked right of a second jury trial in the supreme court. A judgment never ought to be opened to gratify a spirit of litigation. From the novelty of the circumstances of the case, and from the fishing grounds assumed in the bill, in order to catch an equity as well as the amount in controversy, a vast many exhibits and a great body of testimony are found with the record. The evidence in the cause shows most satisfactorily that the complainants have grounds of defense to the action at law.

It is not proper for this court to say what effect that evidence ought to have, or may have, upon an issue between the parties. Nor does it anywhere appear, nor was it necessary it should appear, that all the evidence is produced in this cause within the power of the parties. It is competent for the parties to produce other testimony in explanation of their rights and the merits of the cause. The complainants can not ask more of this court than to be restored to what they have lost without their default. If the defendant had a just claim upon the complainants, to the amount of his verdict and judgment, he has it still, and can prosecute it in the supreme court, as well now as he could if the appeal bond had in form met the approbation of the court; if he had not, to enforce the judgment would be against

all equity. As to accepting the bond, the mistake originated with the agent of the law as well as the appellant. The clerk was wholly ignorant of the law, or the construction which had been put upon it, as to the penalty of the bond. We are not, however, prepared to say that a mere mistake in law of a party would give this court jurisdiction, although there are some cases which seem to go that far: *Hunt v. Rousmanier*, 8 Wheat. 174; *Gainsborough v. Gifford*, 2 P. Wms. 315. It seems to this court, this would be laying down the principle too broadly. There must, in the general, be other circumstances to authorize the interference of a court of equity. Perhaps it would be well to make the case, in addition to a mistake in point of law, one in which it would be against conscience for the other party to insist upon, or which at once would shock the moral sense, if enforced. This is that case, as the bill and evidence disclose it. The respondent has obtained an advantage by the misprision of the clerk, or the mistake of one of the complainants, which he is attempting to retain, when he must know that the appellant has acted, so far as it respects the pursuit of his legal rights, with perfect good faith, and with all reasonable diligence. He must also know that the complainants, especially one of them, has some legal grounds of resisting his claims in a court of law. The law would be dishonored if courts were furnished with no powers to place the parties thus situated *in statu quo*, and thus prevent probable injustice. There is no principle to be found in the books which forbids a court of chancery from granting relief under such circumstances. Reason, justice, equity, require it.

This cause, upon the settled rule that when the court of chancery has gained jurisdiction of a cause for one purpose, it may retain it generally, will remain in this court. This being the unanimous opinion of the court, it is therefore ordered, adjudged, and decreed, that the action at law, the judgment in which is enjoined in this cause, be docketed in the supreme court, in the county aforesaid; that the declaration be so amended as to make said Martin Baum a party thereto; that the said Martin cause his appearance to be entered in the said action, plead thereto the general issue. And that the cause stand at issue for trial on the merits at the next supreme court, for said county. On the trial no objection shall be taken for misjoinder, or want of parties, further than this: If it should appear that the plaintiff has a good cause of action against Oliver, arising out of the transaction in litigation, but not

against Baum, or any other of the company, in the pleadings named in these causes, then a verdict shall be taken against said Oliver and not against said Baum; if it should appear on the trial that the plaintiff has cause of action, growing out of the transaction in litigation, against the said Baum alone, or the said Baum and others, then that verdict shall be taken against the said Baum, and in favor of the said Oliver. In this trial no exceptions shall be taken to the depositions in this suit in chancery, or the action enjoined; but they may then read, unless there may be other legal objections taken and sustained. This cause to stand continued for further proceedings, etc.

POWER OF EQUITY TO RELIEVE AGAINST JUDGMENT AT LAW.—After a judgment at law, any facts which prove it to be against conscience to execute such judgment and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will, in general, authorize a court of equity to interfere to restrain the adverse party from availing himself of such judgment: *Story's Eq.*, secs. 887, 1572; *Marine Insurance Co. v. Hodgson*, 7 Cranch, 33; *Jarvis v. Chandler*, 1 Turn. & Russ. 319; *Truly v. Wanzer*, 4 How. (U. S.) 142; *Emerson v. Udall*, 13 Vt. 477; *Carrington v. Holabird*, 17 Conn. 530; S.C., 19 Id. 84; *Ocean Ins. Co. v. Field*, 2 Story, 59; *Adams' Eq.* 197; *Barnesly v. Powell*, 1 Ves. Sen. 284; *Gaines v. Hale*, 26 Ark. 168. In the case of *Carrington v. Holabird*, 17 Conn. 530; S.C., 19 Id. 84, the court says: "Although bills in equity for injunctions against judgments, as well as for new trials of actions at law, are not frequent, yet they are recognized as falling within chancery jurisdiction, and may be sustained in cases of mistake and accident, when no other remedy is adequate. This jurisdiction will be exercised, when to enforce a judgment recovered is against conscience, and where the applicant had no opportunity to make defense, or was prevented by accident, or the fraud or improper management of the opposite party, and without fault on his own part." Good reason must, however, exist to justify a court of equity in taking cognizance of a cause which has been already determined in a court of law. "A judgment at law ought to be conclusive on the matter in dispute. Such is not only the right of the successful party, but it is to the public interest that litigation shall end." *Hill v. Harris*, 42 Ga. 415. And Lord Chancellor Redesdale, in *Bateman v. Willoe*, 1 Sch. & Lef. 201, says: "I should render that rule nugatory and defeat justice, if, in every case where the party has neglected to apply in due time to the court of law, he should be at liberty to come into equity for a new trial. The inattention of parties in a court of law can scarcely be made a subject for the interference of a court of equity; there may be cases cognizable at law, and also in equity, and of which cognizance can not be effectually taken at law, and therefore equity does sometimes interfere; as in cases of complicated accounts, where the party has not made defense, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something by means of which he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using; but, without circumstances of that kind, I

do not know that equity ever does interfere to grant a new trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction. * * * A bill for a new trial is watched by equity with extreme jealousy; it must see that injustice has been done, not merely through the inattention of the parties, but some such reasons as I have mentioned must exist."

And in *Gainsborough v. Gifford*, 2 P. Wms. 424, the master of the rolls said: "I do agree the court ought to be very tender how they help any defendant after a trial at law in a matter where such defendant had an opportunity to defend himself." "The rule allowing parties to appeal to chancery against a judgment in another court, is of great strictness and inflexibility, and it is necessary that it should be so, as otherwise, the jurisdiction of that court would soon supplant that of all other tribunals. A court of equity, therefore, will not lend its aid, unless the party claiming its assistance can impeach the judgment by facts or on grounds of which he could not have availed himself, or was prevented from doing it, by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his own part." Freeman on Judgments, sec. 485; *Watts v. Gayle*, 20 Ala. 817; *Gott v. Carr*, 6 Gill. & Johns. 309; *Fowler v. Lee*, 10 Id. 358; *Little v. Price*, 1 Md. Ch. Dec. 182; *Windwart v. Allen*, 13 Md. 196; *Emerson v. Udall*, 13 Vt. 477; *Pettes v. Bank of Whitehall*, 17 Id. 435; *Benton v. Wiley*, 26 Id. 432; *Miller v. Morse*, 23 Mich. 365; *Lester v. Hoskins*, 28 Ark. 63.

But although courts of equity will not, for slight cause, interfere with or set aside judgments at law, they will do so when good and sufficient cause appears. "While the courts of equity in England, and in the several states of this Union, have uniformly refused their aid in all cases where their action would involve either the usurpation of appellate jurisdiction, or the granting of a second opportunity of presenting a cause upon its merits, they have, on the other hand, uniformly extended their beneficent principles and their varied and efficient means of relief over a large and well-defined class of cases, to the end that no man should retain an unconscientious advantage procured by him in a court of law or of equity, through his own fraud, or through some excusable mistake or unavoidable accident on the part of his adversary." Freeman on Judgments, sec. 486; *Wright v. Miller*, 1 Sandf. Ch. 108; *Whittemore v. Coster*, 3 Green. Ch. 438; *Taylor v. Fore*, 42 Tex. 256; *Wingate v. Haywood*, 40 N. H. 437. But to entitle a party to relief he must be free from all fault or negligence on his part. "The rule of the best considered and more recent cases upon this subject is, that the party must have failed in obtaining redress in the suit at law, by the fraud of the opposite party, or inevitable accident or mistake, without any default either of the party or his counsel. * * * Stress being laid upon the fact that the plaintiff's failure to obtain justice at law has been without fault on his part. And by this we understand, not willful fault, but such want of care, and diligence, and prudence, as is requisite in the ordinary business of life." *Burton v. Wiley*, 26 Vt. 432; *Story's Eq.* sec. 1574; *Taylor v. Fore*, 42 Tex. 256; *Emerson v. Udall*, 13 Vt. 477; *Pettes v. Bank of Whitehall*, 17 Id. 435; *Carrington v. Holabird*, 17 Conn. 530; S. C., 19 Id. 84.

Unless the complainant is chargeable with laches, his failure to discover his mistake until too late to avail himself of his remedy by petition for a review, or by motion for a new trial, will not deprive him of his right to apply to equity for relief against a judgment which it would be unjust and inequitable to enforce against him: *Currier v. Esty*, 110 Mass. 536. The fact that he is thus left without a remedy at law makes his claim to equitable relief all the stronger. So, too, "the denial of a motion to open a judgment,

does not preclude a court of equity from subsequently granting the relief denied at law. The decision of such motion is not such a *res adjudicata* as precludes equity from re-examining the question." Freeman on Judgments, sec. 511; *Simpson v. Hart*, 14 Johns. 63; *Wistar v. McManes*, 54 Pa. St. 318; *Truett v. Wainwright*, 4 Gilm. 418.

If a party has lost his remedy against an erroneous or irregular judgment, without his own fault, equity may interfere: *Story's Eq.*, sec. 1572 n; *Convery v. Swift*, 9 Nev. 39; *Dalton v. Libby*, Id. 192; *Loss v. Obry*, 7 C. E. Green, 52; *Wingate v. Haywood*, 40 N. H. 437. And a court of equity has power to correct a mistake in a judgment or decree: *Story's Eq.*, sec. 166; *Quincy v. Baker*, 37 Cal. 465; *Colwell v. Warner*, 36 Conn. 224; *Gump's Appeal*, 65 Pa. St. 476; *Byrne v. Edmonds*, 23 Grat. 200; *Barthell v. Roderick*, 34 Ia. 517; *Partridge v. Harrow*, 27 Id. 96; *Cohen v. Dubose*, Harper's Eq., 102 [14 Am. Dec. 709]. In the case of *Partridge v. Harrow*, *supra*, judgment in an action on a note was ordered, and the clerk directed to assess the amount due thereon, which, by mistake, he made a much smaller amount than was actually due, and judgment was entered accordingly. The mistake was not discovered until after the period allowed by the statute to correct such errors on motion had expired, and until after the case had been appealed to the supreme court, where the judgment was affirmed for the same amount as in the district court. It was held, notwithstanding the affirmance of the judgment in the supreme court, that the plaintiff, being without fault or negligence, and without any remedy at law, was entitled, by an equitable proceeding in the district court, to have the error in the amount of the judgment corrected. So, too, courts of equity will correct mistakes in their own decrees, and will open decrees regularly obtained by default, even after enrollment, for the purpose of enabling a defendant to defend on the merits, when he was deprived of such defense by accident or mistake: *Willard's Eq.* 78; *Kemp v. Squire*, 1 Ves. Sen. 205; *Robson v. Cranwell*, Dick. 61; *Beckman v. Peck*, 3 Johns. Ch. 415; *Erwin v. Vint*, 6 Munf. 267; *Millspaugh v. McBride*, 7 Paige Ch. 512. In the case last cited, Chancellor Walworth said: "I think the counsel for these defendants has been successful in showing that it is within the power of the court to open a regular decree by default, even after enrollment, for the purpose of giving a defendant an opportunity to make his defense, where such defense is meritorious, and he has not been heard in relation thereto either by mistake, or accident, or by the negligence of his solicitor."

GROUND UPON WHICH RELIEF IS GRANTED. — A court of equity, in granting relief against judgments obtained at law, does not assume to act as an appellate court, nor will it grant relief merely because the judgment was manifestly erroneous. Some ground for equitable relief must also be shown. "The rule is that chancery will not relieve against a judgment at law on the ground of its being contrary to equity, unless the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or unless he was prevented from availing himself of the defense by fraud, or accident, or the act of the opposite party, unmixed with negligence or fault on his part." *Foster v. Wood*, 6 Johns. Ch. 87; *Kinney v. Ogden*, 2 Green Ch. 168; *Cunningham v. Caldwell*, Hardin, 123; *York v. Clopton*, 32 Ga. 362; *Vilas v. Jones*, 1 N. Y. 274; *Williams v. Lee*, 3 Atk. 223. In *York v. Clopton*, the court say: "When a party has once had an opportunity to be heard, and neglects to do so until the judgment of the court has been made, settling the rights of the parties, he must abide the consequences of his neglect. A court of equity can not relieve him therefrom even when the judgment is manifestly wrong." "The loss of a defense, to justify a court of

equity in removing a judgment, must in all cases be occasioned by the fraud or act of the prevailing party, or by mistake or accident on the part of the losing party, unmixed with any fault of himself or his agents." Freeman on Judgments, sec. 486; *Wingate v. Hayward*, 40 N. H. 437; *Hibbard v. Eastman*, 47 Id. 507; *Mastick v. Thorp*, 29 Cal. 444; *Boston v. Haynes*, 33 Id. 31. Equity will never set aside a judgment upon the ground of irregularity, mistake, or error in the judgment of the court of law, or because the court of equity would, in deciding the same case, have come to a different conclusion: Story's Equity, sec. 1572; Freeman on Judgments, sec. 487; *Holmes v. Steele*, 28 N. J. Eq. 173; *Baker v. Morgan*, 2 Dow, 526; *Shottenkirk v. Wheeler*, 3 Johns. Ch. 279; *De Riemer v. De Cantillon*, 4 Id. 85; *Holmes v. Remsen*, 7 Id. 286; *Coffin v. McCullough*, 30 Ala. 107; *McDowall v. McDowall*, 1 Bai. Eq. 324; *Stockton v. Briggs*, 5 Jones Eq. 309; *Reynolds v. Horine*, 13 B. Mon. 234; *Dunn v. Fish*, 8 Blackf. 407. "Mistakes of fact, whether made by the court or by one of the parties, have been successfully employed as grounds for obtaining the interposition of courts of equity, and securing the relief of the party injured by the mistake." Freeman on Judgments, sec. 500 a; *Chase v. Manhardt*, 1 Bland Ch. 350; *Wilson v. Boughton*, 50 Mo. 17; *Boon v. Miller*, 16 Id. 457; *Barthell v. Roderick*, 34 Ia. 517; *Partridge v. Harrow*, 27 Id. 96; *Brewer v. Jones*, 44 Ga. 71; *Kohn v. Lovett*, 43 Id. 179; *Cohen v. Dubose*, Harper's Eq. 102 [14 Am. Dec. 709]. "But equity will never interpose to vacate or enjoin a judgment on the ground of mistake or ignorance of law." Freeman on Judgments, sec. 500 a; *Hubbard v. Martin*, 8 Yerg. 498; *Meem v. Rucker*, 10 Grat. 506; *Shricker v. Field*, 9 Ia. 366; *Richmond and Petersburg R. Co. v. Shippen*, 2 Pat. & Heath, 327. In the case last cited it was held that a court of equity will not relieve against a judgment a party who was prevented from making his defense at law through mistake of law, although it was a mutual mistake by both parties to the suit. And the court, in rendering its decision, said: "If the fact that the counsel were mistaken in the law were a good ground for relief in equity, a judgment at law would be of but little value."

And, "It is undoubtedly the true rule, that neither the ignorance, the blunder, nor the misapprehension of counsel, not occasioned by the adverse party, is any ground for vacating a judgment." Freeman on Judgments, sec. 508; *Boston v. Haynes*, 33 Cal. 31; *White v. Bank of U. S.*, 6 Ohio, 529; *Jones v. Leech*, 46 Ia. 186; *Dibble v. Truluck*, 12 Fla. 185; *Farmers' Loan Co. v. Walworth Co. Bank*, 23 Wis. 249; *Burton v. Hynson*, 14 Ark. 32; *Burton v. Wiley*, 26 Vt. 430; *Quin v. Wetherby*, 41 Cal. 247. It is the duty of each party to an action to exercise due care and diligence in pursuing or defending his rights, and "a complainant in equity seeking to avoid the effect of a judgment against him at law, must, therefore, always disclose a sufficient excuse for not making his defense in the original action." Freeman on Judgments, sec. 502; *Meniffee v. Myers*, 33 Tex. 690; *Yancy v. Fenwick*, 4 Hen. & Munf. 423; *Jenne v. Osgood*, 57 Ill. 340; *Simmons v. Martin*, 53 Ga. 620. Courts of equity will never encourage negligence, and are very cautious in granting relief on the ground that the party injured was ignorant of his defense until after the judgment had been rendered against him: *George v. Alexander*, 6 Coldw. 641; *Garrett v. Lynch*, 45 Ala. 211; *Peagram v. King*, 2 Hawks, 611 [11 Am. Dec. 793]. But if the judgment was unjust, and his ignorance was without any fault, laches, or want of diligence on his part, equity will grant him relief: *Wales v. Bank of Michigan*, Har. Ch. 308; *Hubbard v. Hobson*, Breese, 190; *Inglehart v. Lee*, 4 Md. Ch. 514; *Cape Sable Co.'s Case*, 3 Bland, 606; *Baltzell v. Randolph*, 9 Fla. 366; Freeman on Judgments, 506. Relief has sometimes been granted in equity, on the ground that

a judgment was procured by perjury, especially when the witness upon whose evidence the judgment rests, is afterwards convicted of perjury: *Peagram v. King*, 2 Hawks, 605 [11 Am. Dec. 793]; *Coddington v. Webb*, 2 Vern. 240; *Tovey v. Young*, Prec. in Ch. 193; *Burgess v. Lovengood*, 2 Jones' Eq. 457. But, manifestly, proceedings in equity to vacate or otherwise impair a judgment at law, on the ground that it would not have been rendered but for the perjury of one or more of the witnesses, ought to be confined within very narrow limits, and not entertained except in very peculiar cases. In many actions at law, the testimony of the witnesses is so irreconcilable, with regard to matters clearly within their observation and knowledge, as to induce the belief that the one side or the other is assisted by willful perjury. If the judgment in each of such cases may be reopened, or even made the subject of further controversy in equity, on the ground that subsequent discoveries have placed the defeated party in a position to resume the contest with superior advantages, and with a more reasonable expectation of convincing the court that the perjury was not on his side, but on that of his adversary, then the jurisdiction of courts of equity must be unduly enlarged, the province of determining the credibility of the various witnesses must be taken from the jury, and the hope of reaching some final determination of the rights of the parties must too often prove delusive. *Demeritt v. Lyford*, 7 Foster, 541; *Gott v. Carr*, 6 Gill & J. 309; *Dilly v. Barnard*, 8 Id. 171. "Whenever a party asks a court of equity to grant him a new trial, he must show some reason for not getting it at law." Freeman on Judgments, sec. 506; *Mastick v. Thorp*, 29 Cal. 444; *Harrison v. Harrison*, 1 Litt. 137; *Tarver v. McKay*, 15 Ga. 550.

TO WHOM RELIEF IS GIVEN.—Relief in equity against a judgment is given only to the parties to the action, or to those whose rights are directly affected by the judgment: Freeman on Judgments, sec. 512; *Mayer v. Woodall*, 35 Tex. 687; *Marriner v. Smith*, 27 Cal. 649.

PARTY TO OBTAIN RELIEF MUST DO EQUITY.—"The general rule that he who seeks equity must do equity, is applicable to all complainants seeking relief from judgments against them. Courts of equity never interpose to wrest from any party any legal advantage he may have gained, without requiring his adversary to do complete justice, either by paying the amount due or by submitting to any other order of the court which may be necessary to adjust the rights of the parties with each other according to fair dealing and good conscience." Freeman on Judgments, sec. 516; *Creed v. Scruggs*, 1 Heisk. 590; *Reeves v. Cooper*, 1 Beasl. Ch. 223; *Baragree v. Cronkhite*, 33 Ind. 192; *Yonge v. Shepperd*, 44 Ala. 315; *Overton v. Stevens*, 8 Mo. 622; *Flickinger v. Hull*, 5 Gill, 60; *Shelton v. Gill*, 11 Ohio, 417; *Hill v. Harris*, 42 Ga. 412.

MODE OF GRANTING RELIEF.—"Equity never attempts to act upon the court of law itself, and does not claim any supervisory power over such courts, or the proceedings therein. It acts solely upon the party, and will enjoin him in a proper case, from pursuing any claim in a court of law, over which the courts of equity have a concurrent jurisdiction, and a more perfect means of doing complete justice. This it never attempts to accomplish, after judgment, in a matter where the court of law had concurrent jurisdiction, by declaring the judgment void, or setting it aside, but only by enjoining the party from enforcing it." Story's Eq. sec. 1571; *Gainty v. Russell*, 40 Conn. 450. But "if a verdict be obtained in an action in a court of common law by fraud, circumvention, or perjury, a court of equity may decide that the party shall consent to set aside such verdict, and have the matter tried *de novo* in a court of common law; in other words, a court of equity may require the party to

give nm anniversary a new trial. But it is agreed that this power should be exercised with 'extreme caution,' and the application of the doctrine is greatly restricted, and is confined to cases which present 'peculiar circumstances,' under the maxim, 'there must be an end of litigation.'" *Burgess v. Lovengood*, 2 Jones Eq. 457; *Fentress v. Robbins*, N. C. T. R. 610; *Peagram v. King*, 2 Hawks. 295, 605 [11 Am. Dec. 793]; *Deaver v. Erwin*, 7 Ired. Eq. 250; *Dyche v. Patton*, 8 Id. 296.

THE HISTORY OF THE EXERCISE OF JURISDICTION OVER PROCEEDINGS AT LAW by courts of equity by way of injunction, is thus stated by Mr. Spencer: "The most frequent exercise of the jurisdiction of the court in granting injunctions, was to restrain proceedings at law. It must have been very soon found that without such an interference, it would be impossible for the court to carry out the jurisdiction it had assumed of controlling the law on the principles of equity and conscience. Accordingly, from the time of Henry VI. downwards, we find numerous instances of the granting of such injunctions. These injunctions were enforced, not only against the parties and their solicitors, but their counsel also, as we learn from the cases of Serjeants Glanvil and Powtrel, and of 'Master Robert Snagg.' The chancellors having, as before noticed, persevered in granting injunctions to restrain proceedings at law, even after judgment, their right was vehemently opposed in the time of Edward IV. In one case, 21 Edw. IV., Fairfax held that the court of king's bench had the power of granting injunctions to restrain parties from resorting to any means of delaying actions, even before judgment, in cases within the jurisdiction of the courts of common law; but the court of chancery, as we learn from subsequent authorities, still continued to restrain proceedings at law by action on the case, where a bill was filed in that court for a specific performance. In the 22 Edw. IV., Hussey, C. J., of the king's bench, and Fairfax, J., in the case then before them, declared that as for the penalty, that could not be recovered, and if the chancellor should commit any of the parties, the judge would release them on their being brought up before them by habeas corpus. Fairfax, however, said he would go to the chancellor, and endeavor to persuade him to withdraw the injunction; but the chancellor appears to have been inflexible, and the exercise of the jurisdiction was continued.

"The jealousy of the common law judges against this jurisdiction displayed itself again in the reign of Henry VIII. Indeed, Wolsey, when chancellor, appears to have been rather unscrupulous in granting injunctions. Sir Thomas More endeavored, by a conference with the judges, to allay this jealousy. However, it broke forth again in the reign of Elizabeth, and a barrister was indicted in the court of king's bench under the statute of *præmunire*, for exhibiting a bill in chancery for an injunction after judgment at law in that court.

"In the reign of James I., there was an open rupture between Lord Ellesmere and Lord Coke, as to the right of the court of chancery to grant injunctions after judgment. That sovereign took upon himself to settle the matter. For that purpose he desired the attorney-general, Sir F. Bacon, and the king's counsel to certify what had been the ancient practice in the time of his predecessors. They accordingly certified that in the time of Henry VII., Henry VIII., Edw. VI., and Mary and Elizabeth, there had been a great many injunctions granted after judgment in actions of different natures, real and personal, in the king's several courts of the king's bench, common pleas, and the justices in Eyre. King James (July 14, 1616), on this certificate, ordered that thenceforth the ancient practice as so certified should be com-

tinued. In 1655, the lords commissioners held that where there was an original equity arising out of the nature of the transaction, which was not properly cognizable at law, the party was not estopped by the verdict from seeking relief in the court of chancery; and the court has since interfered, even after execution executed." Spence Ch. Jur., vol. 1, p. 673-675.

NEW TRIAL AT LAW, HOW AND WHEN OBTAINABLE IN CHANCERY.—The general principles by which the action of a court of equity will be governed when its aid is sought against a judgment at law, have already been stated in this and other notes: See *Yancey v. Downer*, 15 Am. Dec. 35; *Taylor v. Lewis*, ante, 35; *Hunt v. Boyier*, ante, 116. These principles control when a decree for a new trial is sought, as well as when some other form of relief is asked. The court of equity does not undertake, in direct terms, to grant a new trial, but, a proper case being established, compels the party in whose favor the judgment was entered "to submit to a new trial or to be perpetually enjoined from proceeding on his verdict." 3 Graham & Wat. on N. T. 1456; *Hunt v. Boyier*, ante, 116; *Floyd v. Jane*, 6 Johns. Ch. 479; *Banks v. Shain*, 6 Lit. 451. "Applications to a court of chancery for a new trial at law are in our time very rare. The practice, except in cases the most extraordinary, has long since gone out of use, because courts of law are now competent to grant new trials, and are in the constant exercise of that right to a most liberal extent. Anciently, courts of law did not grant new trials, and in those days courts of equity exercised that jurisdiction over trials at law, and compelled the successful party to submit to a new trial when justice required it; but even in that age the court of chancery proceeded with great caution. A new trial was never granted, unless the application was founded upon some clear case of fraud or injustice, or upon some newly-discovered evidence which the party could not possibly, by any vigilance or industry of his, have had the benefit of on the first trial." *Doubleday v. Makepeace*, 4 Blackf. 9. And in many instances the application for a new trial has been refused, though the injustice of the original judgment was unquestionable: *Curtis v. Smalbridge*, 1 Chan. Cas. 43; 2 Freem. 178; *Tovey v. Young*, Prec. Ch. 193; *Richards v. Symes*, 2 Atk. 319; *Sewel v. Freestow*, 1 Ch. Cas. 65; *Bright v. Eynon*, 1 Burr. 390; *Smith v. Lowry*, 1 Johns. Ch. 320; *Bateman v. Willoe*, 1 Sch. & Lef. 201. The complainant must show himself free from laches both in the prosecution or defense of the action at law, and in his application to equity for relief: *Faulkner v. Harwood*, 6 Rand. 125; *Dixon v. Graham*, 16 La. 310; *Barrow v. Jones*, 1 J. J. Marsh. 470; *Taylor v. Bradshaw*, 6 Mon. 145; *Glover v. Hedges*, 1 N. J. Eq. 113; *Green v. Robinson*, 5 How. Miss. 80; *Hoomes v. Kuhn*, 4 Call, 274; *Harrison v. Harrison*, 1 Lit. 140; *Ward v. Chiles*, 3 J. J. Marsh. 487.

A new trial will not be granted in equity when the complainant, having an opportunity so to do, failed to make his motion at law: *Veech v. Pennebaker*, 2 Bibb. 326; *Ward v. Chiles*, 1 J. J. Marsh. 487; *Yancey v. Downer*, 15 Am. Dec. 35; nor where, such motion being made on his behalf, it was denied by the court wherein it was heard: *Bush v. Craig*, 4 Bibb. 168; *Davis v. Bass*, 4 Ind. 313. The erroneous action of the court of law should be reviewed and corrected upon appeal or by writ of error. Mere errors or irregularities in the proceedings at law do not afford a sufficient ground for the interposition of courts of equity, either in enjoining the enforcement of the judgment or in compelling the successful litigant at law to submit to a new trial: *Story's Eq. Jur. sec. 896*, and note; *Davis v. Staples*, 45 Mo. 567; *Eyster's Appeal*, 65 Pa. St. 473. Nor will a new trial be decreed because the complainant or his counsel erred in going into the trial at law without sufficient preparation or

evidence: *Smith v. Lowry*, 1 Johns. Ch. 320; *Barrow v. Jones*, 1 J. J. Marsh. 470; nor because excessive damages were awarded by the jury: *Roots v. Brown*, 1 Bibb. 354; nor because the court refused to continue the case when called for trial: *Gales v. Shipp*, 2 Bibb. 241.

While it is true that the authority now generally given by statute to courts of law, to grant new trials, has very nearly dispensed with the necessity of resorting to chancery for that purpose, still instances occasionally occur in which no application for a new trial was made in the original action; or, if made, it was not disposed of on the merits, owing to the operation of some cause which is generally regarded as sufficient to invoke the aid and protection of courts of equity. In these instances chancery still has power to afford relief: *Carrington v. Holabird*, 17 Conn. 530; 19 Conn. 84; *Howe v. Martell*, 28 Ill. 445; *Shepard v. McIntire*, 5 Dana, 576; *Mulford v. Cohn*, 18 Cal. 42; *Booth v. Stamper*, 6 Ga. 172; *Deputy v. Tobias*, 1 Blackf. 311; S. C., 12 Am. Dec. 243; but the complainant must always show why he did not pursue his remedy at law, or that it was impossible for him so to do, owing to the fraud of his adversary, or to some accident or mistake, not chargeable to himself or his attorney. In some very peculiar cases a new trial has been decreed, because the evidence of the facts constituting the complainant's defense was not discovered until after the entry of the judgment at law and the lapse of the time in which he could then move for a new trial: *Deputy v. Tobias*, 12 Am. Dec. 243; *Peagram v. King*, 2 Hawks, 605; S. C., 11 Am. Dec. 793; *Cox v. Mobile*, 44 Ala. 611; *Harvey v. Seashol*, 4 W. Va. 115; *Barret v. Floyd*, 3 Call, 531; *Countess of Gainsborough v. Gifford*, 2 P.Wms. 214; *Hennell v. Kelland*, 1 Eq. Cas. Abr. 377; *Williams v. Lee*, 3 Atk. 223; *Vathier v. Zane*, 6 Gratt. 246. In some of these cases it appeared that the complainant, since the trial at law, had discovered a receipt in full for the demand on which the judgment was entered against him. But, even in cases of this extreme character, it is now questionable whether jurisdiction in equity can be maintained. There must, in the language of the most eminent judges, "be an end of litigation." *Marriott v. Hampton*, 7 T. R. 269; *White & Tudor's Leading Cases in Equity*, 1378; *Simpson v. Hart*, 1 Johns. Ch. 91; 14 Johns. 63; *Anderson v. Roberts*, 18 Id. 533; *Powers v. Butler*, 3 Green. Ch. 465. In some of the states, however, a new trial will be directed in equity, on the ground of newly-discovered evidence, if the complainant was, when sued at law, acting in a representative capacity without any personal knowledge of the facts constituting his defense: *Hewlett v. Hewlett*, 4 Edw. Ch. 7; *Gardiner v. Bowling*, 12 Gill & J. 381; or when the plaintiff at law must have known his demand to be unconscientious, as where, knowing that he had been paid in full, he obtains judgment on account of the temporary inability of the defendant to find the receipt: *Wilkey v. McConnell*, 63 Ill. 238; *Biggins v. Brockman*, Id. 316; *Gardiner v. Bowling*, 12 Gill & J. 381.

Bills in equity, for new trials, have been sustained where it was shown that the jury had been improperly tampered with: *Lawless v. Reese*, 3 Bibb, 486; *Cummins v. Kennedy*, 4 J. J. Marsh. 645; where the party "had been taken by surprise, and evidence was produced at the trial, which he could have no reason to expect would be produced." Ch. Pr., vol. 1, p. 457; 3 Graham & Wat. on New Trials, 1531; *Sneed v. Town*, 4 English, 535; *Gibbs v. Hooper*, 2 Mylne & K. 353; 7 Eng. Ch. R.; or where the cause was unexpectedly set for trial at a special term of the court of which complainant had no knowledge: *Joslin v. Coffin*, 5 How. Miss. 539; where the verdict of the jury was given under a mistake on their part, or on the part of some of them: *Cochran v. Street*, Wythe, 69; *Rust v. Ware*, 6 Gratt. 50; *Woods v. Macrae*, Wythe, 78; where the successful party, through some fraudulent device or misrepresenta-

tion, prevented his adversary from attending at the trial: *Land v. Elliot*, 1 Smed. & M. 608; *Chambers v. Handley*, 4 Bibb. 284; and where the judge was interested: *Milnor & Co. v. The Ga. R. R. & Bkg. Co.*, 4 Ga. 385. Other instances and cases are referred to in 3 Graham & Wat. on New Trials, c. 17; and in the notes to *Earl of Oxford's case*, in White & Tudor's Lead. Cas. in Equity, 4th Am. ed. 1377, 1388.

So far as the numerous cases on the subject accord with the current of modern authority, they seem to support the proposition that courts of equity will direct a new trial after a judgment at law, when the complainant can bring himself within the established principles of equity jurisprudence. To do this he must at least show: 1. That he is, according to equity and good conscience, entitled to the relief sought, and that his adversary has obtained an advantage, which can not be conscientiously retained; 2. That his own conduct has been free from fault and neglect; 3. That, owing to some fraud, accident, or mistake not imputable to himself or his agent, he was not present at the trial, nor able to make his defense then; or if there seeking to make his defense, that he was prevented from moving for a new trial, because the court had no power to entertain such motion, or the judges dispersed, or the term lapsed before it could be made: *Kniford v. Hendricks*, 2 Gratt. 212; *Ward v. Chilea*, 3 J. J. Marsh, 487; or the existence of some other peculiar circumstance, rendering the remedy at law inadequate.

In the case of *Hoskins v. Hattenback*, 14 Ia. 314, it appeared that Hattenback sued Hoskins in October, 1859, in trespass, and recovered judgment for two thousand four hundred dollars. In October, 1860, Hoskins filed a bill for a new trial, in which he averred that the chief issue in the former action was whether an alleged purchase by Hattenback of certain goods from Henneman & Gambert was fraudulent as against creditors; that he succeeded at the trial in proving a fraudulent purpose on the part of the debtors, but could not show that Hattenback had knowledge of the fraud; that he used every means in his power to obtain evidence of such knowledge; that he discovered one witness, who stated that he would swear to facts which would clearly establish such knowledge, but that the witness, at the trial, surprised complainant by swearing to a different state of facts, and thus leaving him without evidence; that complainant could not discover other evidence in time to move for a new trial; that on September 17, 1860, complainant discovered that one Godfret Hattenback would testify that the plaintiff in the former suit told him, witness, that plaintiff was to get two thousand dollars for his trouble and services; that the debtors, H. & G., were to get the balance; that they told said plaintiff, at the time of the sale, that they were in debt, and wished to sell to prevent their creditors from collecting their demands. A demurrer was interposed to this bill, in the consideration of which the court, by Wright, judge, said: "But does the bill show sufficient to authorize a court of equity to grant a new trial? The text-books and cases are full of learning upon this subject. Without, however, entering into the discussion, we state such general propositions as are necessary to the determination of the case before us:

"In *Colyer v. Langfort's administrator*, 1 A. K. Marsh. 174, it is said that: 'In general, where it is proper for a court of law to grant a new trial, if the application is made while that court has power to do so, it is equally proper for a court of equity to grant a new trial, if the application be made on grounds arising after the court of law had ceased to have power to do so.' That case was not unlike this, and is sustained by *Deputy v. Tobias*, 1 Blackf. 311 [12 Am. Dec. 243].

"In *Balance v. Loomis*, 22 Ill.82, Walker, J., uses this language: 'If it appears that the judgment complained of is unjust, and that the party in good faith has used, or attempted to use, all the means given him by law to assert his rights, by active efforts on his part made in good faith, and to the extent that a party has it in his power to use, but has, nevertheless, been prevented from presenting his defense to the claim, equity should grant a new trial at law.' And see Story's Eq. Jur., sec. 887.

"In this case, the testimony of the witness referred to could not have been obtained at the trial. It consists of declarations or admissions made by Hattenback long after that time. Of its materiality there can be no room for doubt. As to its effect or weight, of course, it is not for us to speak, further than to remark, that, if the witness shall be credited by the jury, then, according to the averments of the bill, complainant's defense would be complete, and a different verdict would be found?" *Hoskins v. Hattenback*, 14 Ia. 319.

The principal case is referred to in *Hubble v. Renick*, 1 Ohio St. 171, 177, as authority that an appeal was properly dismissed when the appeal bond was not in double the amount of the judgment and costs; but, so far as we can ascertain, it has never been either doubted or approved, with respect to the proposition that equity may direct that a new trial be had because of a mistake in not taking or perfecting an appeal. There may be many cases in which an appeal is not perfected, or efficiently prosecuted, because of some accident, mistake, fraud, or other cause ordinarily treated as a sufficient ground for equitable interposition and relief. But the instances in which equity can, in effect, revive the right to appeal, when the appellant has clearly suffered it to expire; can compel the assumption of an appellate jurisdiction which, under and in accordance with the constitution and laws of the state, has never attached, must be extremely rare. And, supposing that there may be such instances, it occurs to us that the principal case can not properly be ranked among them. The complainant's claim for the aid of chancery was based upon three grounds: 1. That the judgment was probably unjust; 2. That he had been ignorant of the law; and, 3. That, being so ignorant, he had applied to another person equally ignorant, i. e., the clerk of the court, and in acting as directed by the latter, had very naturally gone wrong. Certainly one who undertakes to take an appeal ought to consult a lawyer in preference to a clerk; and, failing to do so, ought not to be thought guiltless of laches, if his acts are controlled by a mistake of law.

BUTLER v. COWLES.

[4 OHIO, 205.]

ASSUMPT FOR USE AND OCCUPATION WILL NOT LIE, after a recovery in ejectment, to recover rents and profits, accruing after the date of the demise in the declaration.

THIS cause was reserved from Delaware county on the following agreed statement of facts: Bixbe, defendant's intestate, in his life-time took possession of the premises in the declaration mentioned, claiming title thereto. He occupied them a short time himself, and afterwards by his tenants, who paid him rent.

The plaintiff also, during the occupancy by Bixbe, claimed title to the same premises, and, from time to time, gave notice to Bixbe that they were his. The legal title is admitted to have been in the plaintiff, and still to be in him; and, having recovered in ejectment, he has taken possession of said premises under a *habere facias*. If under these facts the plaintiff is entitled to recover, then a jury shall assess the damages; if not, there shall be judgment of nonsuit.

Parish and Boalt, for the plaintiff. Since the statute of 11 Geo. II., assumpsit has lain as well for implied as express agreements to pay for the use and occupation of lands, and it is now a common remedy, both in England and in the United States: 3 Stark. Ev. 1512; 1 Swift's Dig. 417; *Sinnard v. McBride*, 3 Ohio, 264; *Sutton v. Mandeville*, 1 Munf. 407 [4 Am. Dec. 549]; *Twiss v. Baldwin*, 4 Day, 299; *Jacks v. Smith*, 1 Bay, 315; *Smith v. Sheriff of Charleston*, Id. 443; *Codman v. Jenkins*, 14 Mass. 95, 97.

Cowles, for the defendant. The action of assumpsit for use and occupation would not lie at common law. It was given by the statute of 11 Geo. II. This action will lie only where the relationship of landlord and tenant exists, or can be traced, founded upon some agreement express or implied: *Naish v. Tatlock*, 2 H. Black. 319; *Smith v. Stewart*, 6 Johns. 46 [5 Am. Dec. 186]. This action has never been sustained unless there was evidence of a contract express or implied: *Smith v. Stewart*, *supra*. Wherever the circumstances of the case show that the party has held and occupied in any other manner than under a contract express or implied, it has been uniformly held that this action would not lie. In this case it can not be sustained, because the possession of the intestate was, as to the plaintiff, tortious and adverse, and he was considered as a trespasser during his occupation. The plaintiff is estopped from presuming that there was any agreement in this case. The plaintiff's case is unsupported by any authority, except the *obiter dictum* of the judge in the case of *Sinnard v. McBride*, 3 Ohio, 264. In *Abeel v. Radcliff*, 13 Johns. 297 [7 Am. Dec. 377], the case of *Smith v. Stewart* is recognized, and the principle is well settled that this action can not be sustained.

By Court. It seems well settled that a plaintiff, after a recovery in ejectment, can not in assumpsit, for use and occupation, recover rents and profits accruing after the date of the demise in the declaration: 1 T. R. 378; *Sinnard v. McBride*, 3

Ohio, 264; Woodfall's Term L. 432. Bixbe entered claiming title, and not as tenant. This action, by statute 11 Geo. II., c. 19, sec. 14, lies upon an implied agreement to pay rent. To create the relation of landlord and tenant, an agreement, either expressed or implied, must exist. Presumptive evidence will do, such as that the defendant holds over after the expiration of his lease by parol: *Osgood v. Dewey*, 13 Johns. 240; 3 Stark. Ev. 1516; *Abeel v. Radcliff*, 13 Johns. 297 [7 Am. Dec. 377]. But the facts must show, expressly or impliedly, that the defendant occupies as tenant of the plaintiff.

In the case of *Smith v. Stewart*, 6 Johns. 46, the defendant took possession of lands as a purchaser from the plaintiff, and by his consent, but afterwards refused to pay, and abandoned the contract. The court say, as the defendant did not enter under the relation of tenant, but under a contract for a deed, the plaintiff could not recover in this form of action. The same principle was decided in the case of *Bancroft v. Wardell*, 13 Johns. 489;¹ 1 Esp. N. P. 20; Woodfall's Term L. 432; 3 Serg. & R. 500; *Allen v. Thayer*, 17 Mass. 299; *Wyman v. Hook*, 2 Greenl. 337; *Sutton v. Mandeville*, 1 Mun. 407 [4 Am. Dec. 549]; *Wharton v. Fitzgerald*, 3 Dall. 503. These authorities establish the principle that when a person occupies the land of another, not as tenant, but adversely, or where the circumstances under which he enters show that he does not recognize the owner as his landlord, this action will not lie. The remedy is trespass for mesne profits, after a recovery in ejectment. It has been determined that a defendant can not, in this action, dispute the title of the plaintiff, and that *nil habuit in tenementis* is a bad plea: *Lewis v. Willis*, 1 Wils. 314; *Cook et al. v. Loxley*, 5 T. R. 4; *Sullivan v. Stradling*, 2 Wils. 208. In the principal case the facts admit that Bixbe entered claiming title. This, surely, rebuts the implication of the relation of landlord and tenant.

There is no express contract to pay rent; consequently, the plaintiffs can not recover on the facts before the court.

Judgment of nonsuit.

1. *Bancroft v. Wardell*, 13 Johns. 489 [7 Am. Dec. 386].

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

CUMMINGS v. LEBO.

[2 RAWLE, 23.]

A DEFECT IN A DECLARATION, by which the condition of a bond is stated to be that a debtor "should not be and appear," etc., being the effect of accident, and amendable below, is to be considered as actually amended in the supreme court, and treated as if the word "not" were omitted.

DEBT by Lebo on a bond given by Cummings and Wertz. The declaration set forth that the condition of the bond was that if Cummings, who was then under arrest under a *ca. sa.*, at the suit of Lebo, "should not be and appear" at the next court, etc., the bond should be void. Verdict and judgment for the plaintiff.

Bellas, for the defendants below on error, urged that there could be no judgment for the plaintiff, as the debtor had done what it appeared from the declaration, the bond was conditioned for.

Lashells, contra, was stopped by the court.

By COURT. Justice, convenience, and common sense require that this exception should not prevail. Equity would reform such a bond as is here set out, on the intrinsic evidence of mistake, which it bears on its face. The condition is not to appear, and it is in principle exactly the case of the promissory note mentioned by Lord Hardwicke: 2 Atk. 31; in which the borrower promised never to pay. The plaintiff ought to have declared on the instrument according to its legal effect; so that, whether the bond contain the objectionable word or not, the defect in the declaration, being equally the effect of accident, and amendable below, is to be considered as actually amended here.

Judgment affirmed.

ALEXANDER v. KERR.*

[2 RAWLE, 83.]

FOR INJURY TO LAND, HOWEVER INCONSIDERABLE, when occasioned by a nuisance, action on the case will lie.

THE SILENCE OF THE OWNER OF LAND, in regard to injury which he suffers from a dam on the land of another about to be purchased by a third person, is not such a concealment as will deprive him of his right of action against such third person for injury received subsequent to the purchase; the injury likely to be occasioned by a continuance of the dam being self-evident.

IN error. Action on a case for injury occasioned by the overflowing of the defendant's mill-dam. The facts are stated in the opinion of Judge Huston. Verdict for the plaintiff below, W. Kerr.

Burke and Forward, for the plaintiffs in error. A slight inconvenience arising from the reasonable use of one's property, gives no ground of action: Com. Dig., Action on the case, C; 3 Cai. 307; 15 Johns. 213; 8 Mass. 136. Standing by and remaining silent at the sale to the defendant, is sufficient to postpone the rights of W. Kerr, to those of a *bona fide* purchaser without notice: 1 Serg. & R. 111. Lying by while improvements have been made has had that effect: 2 P. Wms. 82, 83; 2 Eq. Cas. Abr. 488; 9 Mod. 2, 3; 1 Hen. & M. 429; 2 Cai. 382; 2 Johns. 573; 5 Ves. 689, note; Rob. on Stat. Frauds, 129, 132; 3 Atk. 692; 2 Id. 82; 3 Serg. & R. 203; 10 Id. 43; 13 Id. 304; 8 Id. 92; 2 Munf. 468; 5 Id. 334; 1 Fonb. 163.

Fetterman and Baldwin, *contra*, directed to confine their attention to the second point of the opposite attorneys, urged that a license, merely gratuitous, may be revoked at any time: 10 Johns. 246; 3 Dane's Abr. 252; 11 Mass. 503; that lying by is no stronger than such a license, and a change in the ownership of the land is equivalent to a revocation of such a license: 11 Mass. 503; 6 Johns. 136; and that the defendants below had, in fact, notice, by reason of the nature of the nuisance: Sugd. Vend. & Pur. 478; 9 Mod. 96; 1 Vern. 136; 2 Id. 150, 239, 370.

* The following statement, appearing in the original report, explains why this and the succeeding decisions from 2 Rawle are out of their chronological order: "The following cases, embracing a few of the decisions at Pittsburg, September Term, 1822, and the whole of those at Chambersburg, in September Term of the same year, were prepared for the press by Mr. Sergeant, who intended to publish them in the closing volume of Sergeant & Rawle's Reports. They were found, however, too numerous to be introduced into the seventeenth volume, and too few to form a separate one; a place is, therefore, given to them in the present volume."

By Court, GIBSON, C. J. It is supposed that an inconsiderable injury from a nuisance, is an insufficient cause of action. Admitting the propriety of the judgment in the particular cases that have been cited in support of the position, I am unable to concur in the reasons of the judges, who seem to have thought, that the right to recover at all, depends rather on the extent than the nature of the injury. The true distinction seems to be between cases where the injury is remote and common to many, without particular damage to any one, and those where it is proximate in its effect, and confined to particular persons. For injuries of the first class, it is proved by the authorities collected in Com. Dig., Action, B, 2, that an action does not lie. And of this class are the cases cited from the New York and Massachusetts Reports, as well as the case of *Shrunk v. The Schuylkill Navigation Co.*, 14 Serg. & R. 74, which was an action for obstructing the passage of fish, by which the plaintiff's fishery was destroyed. And there is sound reason for the distinction. All persons have a natural right to the use of water flowing over their land. But if each was answerable to all the rest for consequences that are in a greater or less degree inseparable from every exercise of the right, the benefit of the stream would be lost to all, for no one could use it without producing a diminution of its quantity by consumption, or evaporation, or an irregularity in the flow of it by retention. The law, therefore, requires each to bear with the consequences of a reasonable use of it by his neighbor. But these consequences, instead of being slightly injurious, may be destructive of valuable natural advantages. The consumption of but a small portion of the stream might, by rendering the residue insufficient for the purposes of a mill, destroy a valuable site; and the retention of the water for but short intervals, would render the stream useless to a furnace, the operations of which can not be intermitted. But this would not give a claim to the value of the site in damages. So, an action will not lie for the destruction of a fishery from an erection which prevents the passage of the fish.

In these cases the injury is remote, the party having no property in the water used, or retained, nor in the fish before they are caught, and it is general in its consequences to all occupants of the stream, similarly situated. But to flood the land of an adjoining occupant is not necessary to the enjoyment of any natural right. The injury produced by it is out of the common course, and done to an individual; whether it be great, or whether it be small, is a consideration that can affect only the

quantum of the damages. In the application of the principles connected with the remaining point, there may, perhaps, be greater difficulty. Before the dam was erected, the terretenant of the land now owned by the plaintiff objected to its being erected, as being likely to prove injurious to him. From that time to the inception of this action, neither he nor his successors testified any dissatisfaction, usually grinding their corn at the mill, and some of them declaring that the dam did the place no injury; and one of them being present when the mill was purchased by the defendants, omitted to give notice of the existence of the injury for which damages are sought, and to declare his determination to insist on having it removed.

The equity attempted to be deduced from these circumstances depends on distinct considerations. Against the original author of a nuisance, no forbearance to sue, short of the period which, in analogy to the statute of limitations, has been assumed as conclusive in the case of an adverse occupancy of a water right, can be set up as a bar; and as the dam was erected in 1810, it is impossible that there can have been a forbearance for twenty years. Nor can this period be abridged by the interference of a purchaser who has no reason to infer, from a forbearance for a considerable time, a determination to forbear forever. Such a purchaser, voluntarily and with full knowledge, takes the place of a wrongdoer, and stands in no higher equity. He, therefore, has no right to be informed that the suffering party has not abandoned his rights. But a positive act, calculated to induce him to purchase, would place him on higher ground; and were it shown that he purchased here on the faith of declarations by the plaintiff's predecessors, that the dam was not injurious to them, I should hold the merits of the cause to be with him. But that circumstance was not an ingredient in the case submitted to the court, nor is anything of the sort to be found in the evidence. The defense, then, rests exclusively on the effect of Ebenezer Kerr's silence at the sale; for if the circumstances which I have just mentioned be insufficient to raise an equity, considered separately, they will be insufficient in conjunction with other circumstances which, separately, are also insufficient. Undoubtedly there are cases where the mere concealment of the title of a third person may be fatal to his right; and this principle may, according to circumstances, be applicable to the case of a nuisance, caused by an erection on the property purchased. Where the existence of the nuisance is not self-evident, it may unquestionably be the duty of the party injured to ap-

prise the purchaser of the responsibility to which he is about to subject himself.

But while courts of justice have, on the one hand, endeavored to repress dishonesty, they have, on the other, exacted the utmost vigilance and caution. It is difficult to imagine how the concealment of a fact, which an individual of common prudence and sagacity would discover, can constitute a fraud. It is a clear elementary principle, that the law imputes to the purchaser a knowledge of every fact of which the exercise of ordinary diligence would have him put in possession: Newl. Cont. 511. And such an imputation of knowledge is sufficient to rebut the inference of a merely constructive fraud, which might otherwise be implied from the silence of a party. Even a positive misrepresentation which, when it induces a careful man to forego an inquiry that would have resulted in full knowledge, constitutes positive fraud, even where the means of information are not exclusively within his reach, will, nevertheless, not give him an equity, if he had, in fact, a knowledge of the true state of the case, derived from other sources, because he was, in truth, not deceived. It is also a familiar rule, that notice is unnecessary where the fact is equally within the knowledge of both parties; which it must be taken to be, where the sources of information are equally accessible to both, and the state of the fact is obvious to the senses. These are elementary principles, about which, I presume, there is no dispute; and what evidence is there in the case, that would induce a chancellor to enjoin the plaintiff from proceeding at law? It does not appear that the plaintiff's grounds were inundated while the stream was at low-water mark; and hence it might seem that the injury was only occasional, and that the traces of it were not permanently obvious. But the water was swelled in the channel within the plaintiff's boundary, even when the dam was not full, and the grounds exhibited permanent marks of injury from high water; ponds being formed, the soil washed away in some places down to the gravel, and the fields sanded and covered with drift-wood. It is in reference to the existence of an injury such as this, that the silence of Ebenezer Kerr is supposed to constitute a fraud.

The defendants were unquestionably bound to inspect the subject of their purchase, without which they would become chargeable with gross negligence, which is equivalent to actual knowledge of whatever a personal examination would have disclosed, or put within the range of detection. The slack water, extending from the dam to a point within the plaintiff's bound-

ary, and the marks of injury to the grounds, were amply sufficient to put them on their guard; and, as the direction of the court is to be considered in reference to the case appearing on the evidence, it seems to me there was no error in charging, that the silence of Ebenezer Kerr at the sale ought not to prejudice the plaintiff's claim to damages in this action.

HUSTON, J. In this, as in most cases, it is necessary to attend minutely to facts and dates, in order to understand the opinion of the court. Daniel Herbert, in 1786, purchased a tract of land, and resided on it until 1813, when he sold it to William Gilmore. On the twenty-sixth of August, 1820, Gilmore conveyed it to Ebenezer Kerr. It was stated and conceded that though the deed was made in 1820, yet articles had been entered into, and possession delivered to Kerr, several years previous. In 1824, Ebenezer Kerr sold to William Kerr, the plaintiff below. The land lay on Charteirs creek. T. Algeo owned some land on the same creek, below the above-mentioned tract, and erected a mill, about 1809, on it. Herbert, who then owned the plaintiff's land, told Algeo that if the dam he was erecting should swell the water so as to injure his (Herbert's) place, he would bring suit against him. Herbert, however, lived there four years, and never did bring suit nor complain of injury. On the contrary, it was proved that he said the dam did no injury; for that although it swelled the water higher when the flood was in the creek, yet it lessened the rapidity of the current, and his banks were less injured. Several years after the mill was built, an additional water-wheel was put in and another pair of stones. Algeo died, and his executors sold the mill and thirteen acres of land, at public vendue, for eight thousand eight hundred and fifty dollars. Ebenezer Kerr, who then owned the plaintiff's land, was at the sale, and gave no notice. All the witnesses agreed that without the mill the thirteen acres were not worth three hundred dollars. The proof was that the defendants had paid all but about three thousand dollars of the purchase-money before this suit was brought. The plaintiff's counsel alleged they had not paid so much. The deed from the executors to the defendants was not produced, but it was said to contain no warranty as to water-right. The defendants have refused to pay any more money until this is settled.

Much testimony was given to prove that the plaintiff's land was overflowed at high water before the mill was erected; that a breastwork had been built thirty years ago to keep the water from running through the bottom land, and the flood carried it

away immediately; that this creek overflows and injures the bottom land on other farms where no dam was near them; and that several have been injured much more than this. There was no proof that this tract is injured except in time of floods; but there was proof that it had been overflowed in part, and injured repeatedly within ten years; and that floods had in one or more places carried off the soil loosened by the plow. It is not to be forgotten that the dam was not opposite the plaintiff's land, but was one hundred and eighteen perches below the plaintiff's lower line. So that in examining the breast and ends of the dam, the plaintiff's land would not be in view. No part of the premises bought touch or come near the plaintiff. It is a consequential injury, not constant and visible at all times, but occurring only when high floods occur; and that injury is not discoverable from an examination of the premises bought by the defendants.

There was much contradictory testimony whether any injury at all had been done to the plaintiff's land. And the court told the jury that if they could not decide from the testimony whether there was, or was not, any damage to the plaintiff, they ought to give credence to those opinions which appear to be founded on the soundest principles of philosophy and the natural consequences that must be the result of the circumstances that have been testified to. I will only say, this is to me new ground, and I think most dangerous. Whether a flood will carry away soil or leave a deposit cannot, I believe, be ascertained beforehand by those who have viewed the ground, even while covered with water; and the testimony of one witness who saw it after the flood, and who testified that no soil was washed away, but that the flood left a deposit on the ground, would outweigh all the reasonings of all the philosophers in the world. I do not say there is no case in which a witness may be disbelieved because his testimony is contrary to the nature of things, but I protest against introducing speculations of philosophy to overrule positive testimony of plain, honest men. The principal questions in this case arose on the effect to be produced by the declarations of Herbert and Gilmore, under whom the plaintiff claimed, and the silence of E. Kerr, who was at the vendue and gave no notice; who saw the defendants buy for eight thousand dollars, and who, as the plaintiff contends, had the right to reduce the property to be worth only three hundred, and who did not mention this right of his. The judge says: "He had his deed recorded, and they must look to that, and

he was not bound to give notice." But it is obvious his deed could not give any information on the subject of the water rising, or that when it rose it overflowed its banks. The judge says: "There is no evidence that the defendants ever heard that Herbert and Gilmore said it did not injure this land; but," he says, "they were bound to inquire." Now if they did inquire, they heard what would have induced them to purchase. But after a dam had stood many years after the plaintiff's lands had changed owners three times, and no complaint, the then owner, being present, was bound by every principle of justice to make known this concealed claim of right of his to pull down that dam and render the property of no value.

It ought not to be forgotten, that in newly-settled parts of the country, he who builds a mill is considered as doing a great benefit to the neighborhood. If it is true that he may be not only permitted but encouraged to build; that all the owners of adjoining lands may expressly or tacitly agree; and yet, when the mill has become valuable, the vendee of any of those who agreed to its being built, nay, the fourth vendee, when none of the prior owners had objected, may compel him who built it, or his children after his death, or the purchaser of what the builder and his children had enjoyed in peace, to pull down the dam, it is time this should be known. It is said, this matter has not been decided; that it is only to be found in elementary writers. This is a great oversight. I should suppose one hundred cases could be collected in a short time. I shall mention a few from the English books, and will only add that modern cases are not contrary. 2 Atk. 83: Where a man has suffered another to go on building upon his ground, and not set up a right till afterwards, when he was all the time conusant of his right, and the person building had no notice of the other's right, chancery will oblige the owner of the ground to permit the other to enjoy quietly and without disturbance. 3 Atk. 692: Tenant for life makes a lease for sixty years; tenant rebuilds the house at a great expense and assigns his lease. In the twenty-ninth year, tenant for life died; the tenant in possession paid the rent for six years to the remainder-man, and in the mean time made additional buildings. Remainder-man brought ejectment and recovered; and an injunction granted, because the remainder-man stood by and saw tenant rebuild, and gave no notice, and because he accepted rent while tenant was adding additional buildings, and gave no notice.

Here a title good at law, and a recovery at law, were post-

poned; and yet it might, with some color, have been said, the tenant was bound to inquire into the title of his landlord; this, however, was not sufficient to protect the legal owner, who was estopped by his own silence. *Rice v. Potts*, Prec. in Ch. 35: A. was tenant in tail, remainder to B., in tail. A., not knowing of the remainder, made a settlement on his wife by way of jointure; this was engrossed by B., who knew of the entail, but was silent. After the death of A., B. brought ejectment, and recovered against the widow. She was relieved in chancery, and a perpetual injunction granted: 2 Vern. 150. 2 Johns. 589: Thompson, J., in delivering the unanimous opinion of the court, says: "Though it does not appear that B. took any agency in the negotiations, yet his presence and silence are equally efficacious and binding on him, if the complainant was thereby misled and deceived. There is an implied as well as an express assent; as, when a man who has a title, and knows it, stands by and either encourages or does not forbid the purchase, he and all claiming under him shall be bound." And he quotes, with approbation, the sentence in equity: "Therefore, when a man has been silent, when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent." In this case, too, a legal title was postponed. The decisions of our own courts are also strong on this subject. *Covert v. Irwin*, 3 Serg. & R. 289: Land was selling by the sheriff as the property of T. Proctor. Covert was in possession of the land, claiming it as his own; but it had been somehow reported that he was in under Proctor; he was present at the sale. The opinion of this court, delivered by the late chief justice, was: "I think the court were right in the opinion that if Covert did stand by, knowing that he was represented as Proctor's tenant, and not contradicting it, he could not afterwards contest the title of Proctor with the purchaser." In this case, E. Kerr stood by and saw this mill selling, with the dam as it is now; if he did not make known his claim of a right to compel it to be taken down, I do not see how he can, or why he ought to be permitted to assert that right now. *Billington v. Welsh*, 5 Binn. 129 [6 Am. Dec. 406]: Welsh had purchased and paid for fifty acres of land, part of a tract of Turner's, on which was a forge, etc., had built a house on it, and was living there; he was a brother-in-law of Turner, advertised several times, and at length sold. Welsh knew well of the advertisement. The cause was tried before Judge Yates, who told the jury that if Welsh knew of what was going on, he ought to have given notice of his claim

to the sheriff, and warned all persons against purchasing; failing herein, a legal fraud would be imputed to him. On appeal, this was affirmed. Chief Justice Tilghman says: "It became his duty to make known his secret title to part of the land; he gave no notice; not having done so, he acted at his peril, and has no right to complain if his title is impeached by persons who had not actual notice of it."

When we consider the law of levies and sheriff's sales, that a plaintiff can take only what is the defendant's, and that a purchaser buys at his peril, that case is much stronger than this. 13 Serg. & R. 167, is a late case, and the principle is fully recognized. The sheriff was selling a tract of land on the oldest judgment, but notice was given at the sale that it would be sold subject to a younger mortgage. The purchaser refused to pay the mortgage. This court held, that although it could not legally be sold subject to the mortgage, yet as the purchaser, who was the plaintiff at whose execution it was sold, was silent, and did not make known his opinion that the purchaser would hold it clear of the mortgage, he could not keep the land without paying the mortgage; his silence was considered equal to his express agreement, that it should be sold subject to the mortgage; and that silence cost him his debt.

The case in 8 Serg. & R. 92, is nearly in point. A dispute arose as to the right to use an alley in Philadelphia. The court were of opinion against the right of the plaintiff; it had been conveyed by one whose right would not authorize such a conveyance; but the alley was used by all those living in the court. The plaintiff bought, and though by a close examination of the deeds it could be discovered that her title to the use of the alley was not good, yet she recovered against the defendant for disturbing her in the use of it, on the ground that when she bought she saw those who lived in the court actually using the alley. "Shall," says the chief justice, "the defendant be permitted to hold out false colors to the injury of innocent purchasers? Is not the case as strong against him as against a prior mortgagee who is privy to a second mortgage and conceals his own?"

Let us now look at the matter on principle. Admit that Herbert might have sued and recovered damages; he would not, he did not; but he sold to Gilmore. What did he sell? His land as it then was, with the dam erected. Gilmore not only did not claim a right to pull down the dam, but he did not wish for such a right; he said it did him no harm. Clearly, he did not

sell to E. Kerr, nor did E. Kerr possess the right to compel Algeo or Algeo's heirs to pull down this dam. He lived there some eight or ten years; stood by and saw it sold, for twenty times its value, if the dam were removed; he gave no notice, because he had no right, or because he was determined never to use it; and the present plaintiff is as much bound as he was.

It has, however, been argued, that if notice is given before all the purchase money is paid, a purchaser is not protected. As to the fact, the proof is not contradicted by any proof, though it was by the statement of counsel, that above four thousand dollars had been paid, and something more than three thousand remained due; and Sugden was cited to prove the position, that if notice is given before the deed is executed, though all the money is paid, or before all the money is paid though after the deed is executed, the purchaser is not to be considered as an innocent purchaser without notice. Admitting for the present, what I do not agree to without qualification, that the law is so settled, it will be found to apply to cases where the notice was given as soon as the purchase was heard of, and has no relation to cases where a man stood by and saw a contract made, possession taken, a great part of the money paid, and a deed received, without those clauses which would have been required if notice had been given. It can only apply to cases where he who gives the notice did not know of a bargain proceeding. The law is not so absurd as to permit a man to see a sale made, and nine tenths of the money paid, possession taken and kept for years, the money paid to executors, and by them to the creditors or heirs, and irreclaimable; and, after all this, consider his conduct fair, if he gives notice before the last ten dollars are paid. But even Gilmore, if now in possession, and owner, could not, on the testimony given, support a suit against Algeo, if alive, although Herbert did tell Algeo that he would sue him if the dam injured his place; yet he afterwards said it did him no injury and he did not sue. Gilmore purchased and said it did him no injury; and, after this, Algeo put another water-wheel and additional stones in the mill, and increased its value at great expense. It would have been a fraud in him to have required afterwards that all this should be destroyed; and if he had recovered at law, chancery would have granted an injunction. Many of the cases cited prove this; and there is another in 2 Eq. Cas. Abr. 522, and cited and approved in Harrison's Chancery, 172. A. sees pipes laid at great expense, and makes no objection; afterwards he sues, and chan-

cery granted an injunction. In fact, the principle is the same whether a man is permitted to improve at a great expense, or purchase at a high price; in neither of which cases can a man, who has permitted the alleged nuisance to stand many years without objection, and who sees additional money expending without objection, be heard, when he afterwards applies to a court to render the improvements or the purchase worthless.

I see much evil and injustice in this individual case, and more in its consequences. If the owner of land can suffer a friend to erect a dam, and make no complaint for fifteen years, till that friend sells it, and then cause it to be pulled down, it is a serious matter to the community; but if the owner of land permits a dam to be built, which occasions the water to swell on his land, and sells his land, as the land then is, with the water swelled; if it is sold again, and no objection is made; if, under these circumstances, the mill has been enlarged and improved at great expense, and is sold for its full value, and, after this, the terre-tenant sells to a fourth owner, and he can overhaul all this and destroy the mill, it is, to my mind, a great imputation on our laws; such has not been the understanding, nor such the decisions. I think there was error in the charge of the court.

TOD, J., concurred with HUSTON, J.

Judgment affirmed.

Frequent reference is made to this decision on the main proposition which it establishes, and which is thus stated in *Orest v. Jack*, 3 Watts, 240: Equity, on the mere ground of silence, does not relieve one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in spending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is willful, and he acts at his peril. Other references can be found in *Beidelman v. Foulk*, 5 Watts, 314; *Rodes v. Frick*, 6 Id. 323; *Carr v. Wallace*, 7 Id. 401; *Bird v. Smith*, 8 Id. 441; *Rohr v. Kindt*, 3 W. & S. 565; *Miller v. Cresson*, 5 Id. 302, and in *Knouff v. Thompson*, 16 Pa. St. 364, adverting to the distinction here recognized between an omission to give notice, and encouragement by positive acts. In *Pittsburgh v. Scott*, 1 Pa. St. 309, 320, upon the remaining point raised in the principal case, it is said: "In *Alexander v. Kerr*, 2 Rawle, 83, it is ruled that an action on the case will lie for an injury to land, however inconsiderable, which is occasioned by a nuisance. That is a case of private nuisance, and is a direct injury; still, we think it applicable to an injury done by a common nuisance, the consequence of which is that another is hindered and delayed in his business. It would not be so in England, where a distinction, which we have repudiated, is taken between direct and consequential damage."

CARSON v. McFARLAND.

[2 RAWLE, 118]

AN ADMINISTRATOR CAN NOT RECOVER BACK money which he has paid to a creditor of his intestate, on account of a just debt, where a deficiency subsequently arises, not attributable to accidental failure of assets.

ERROR to the court of common pleas. The opinion states the case.

Chambers, for the plaintiff in error.

Crawford, *contra*.

By Court, HUSTON, J. The case stated was to be considered as a special verdict. The following is an abstract of the facts: On the fifteenth of May, 1822, Thomas Carson, the plaintiff, took out letters of administration on the estate of John Huston, deceased. He filed an inventory in due time, and held a vendue of the personal property, which personal property amounted to above four thousand dollars. On the fourteenth of March, 1823, Thomas Carson paid to the defendant two hundred and twenty-three dollars and forty-six cents, being the amount of a single bill given by John Huston, in his life-time, to the defendant. John Huston was one of the sons of James Huston, deceased, and had shortly before his death taken, under a decree of the orphans' court of Franklin county, a part of his father's estate, at an appraisement, and entered into recognizances to pay to his brothers and sisters their shares of the said lands.

In August, 1823, the administrator, Mr. Carson, applied in due form of law to the orphans' court for an order to sell the lands of John Huston, deceased, to enable him to pay the debts. Not being able to obtain a satisfactory price, the order was continued at several subsequent courts; and in February, 1825, the land was sold for eight thousand four hundred and fifty dollars, and in April following the sale was confirmed. It now appeared that the proceeds of the whole real and personal estate would not pay the debts of the deceased; and, on application of the administrator, the court appointed auditors to apportion the money among the creditors. In April, 1827, their report was made and confirmed by the court. By this report, the whole proceeds were required to pay debts of a higher degree than specialties; in fact, the recognizances were not all paid, but the conusees have received something less than their whole debts.

The plaintiff then brought this suit to recover back from John

McFarland, the defendant, the sum of two hundred and twenty three dollars and forty-six cents, alleging it was paid him under a mistake as to the solvency of the estate. There was no allegation of any actual wasting by the administrator; the deficiency arose from the accumulation of interest, and the depressed price of lands. It will be observed, that in this case the administrator paid the money within the year, and to a person undoubtedly a creditor of the estate; and that, if there was any mistake as to the solvency of the estate, such mistake arose, not from any statement or representation of the defendant, but from some other cause. The law, as it regards the liability of administrators or executors, and how far and under what circumstances they may become personally liable for the debts of the estate they represent, is not an unimportant part of our jurisprudence. I do not mean to go out of the present case, or even to hint an opinion on some of the topics discussed, and which must present themselves to the mind. In England, after some variance of decision, it seems to have been settled at one time, that a creditor, or even another legatee, could, in some cases, compel a legatee, who had received his legacy, to refund, in case of a deficiency of assets. This is, however, with some restriction; for, if the assets were sufficient at the decedent's death, but were wasted by his executor, there was no refunding in favor of the legatee, or, perhaps, of the creditor; and a further distinction seems to have existed, as to refunding in favor of the legatee or creditor, when the executor was insolvent, and in favor of the executor, who would lose, unless he could compel those who had received to refund: See 1 Vern. 94, 460, 469; 1 P. Wms. 495; 1 Anstruther, 112; Com. Dig. 630; Ch. Leg. (3 G. 3); 1 Vern. 162; 2 Johns. Ch. 626, 627.

But even there, on reading carefully the cases cited, there will be found some reason to believe it was only where refunding receipts were taken, or in consequence of the peculiar jurisdiction and authority of the court of chancery, that any one, who had received only what was at the time supposed due to him, would be compelled to refund: 2 Com. Dig. Chan. (3 G. 3); 2 Vent. 360. There is in *Pooley et al. v. Ray*, 1 P. Wms. 355, a dictum of the master of the rolls, that a creditor who has received money due him from the estate, may be sued, and compelled to refund in favor of another creditor; but, on a rehearing of the case, nothing is said on this subject: 2 P. Wms. 291, 297; *Coppin v. Coppin*, 2 Ves. 192. There is not, it is believed, in the English authorities before our revolution, any

direct decision, that a creditor, who has been paid a debt due him, can be compelled to refund in favor of another creditor; though it must have often happened that one received all the assets and another received nothing, or was paid out of the estate of the executor; and there are express decisions to the contrary: See 2 Vent. 260; Com. Dig. Ch. 393. In this case, the administrator paid money justly due, and paid it within the year allowed by our law, to ascertain the situation of the estate. The assets were, or ought to have been, better known to the administrator, than anybody else. No accidental failure of the fund occurred, to any material extent; the defendant has no money to which in honesty and conscience he is not entitled, as against the estate of the deceased. The hardship on the plaintiff may be great. The hardship on the defendant, if called on to refund, would not be small; and the confusion, inconvenience, and general uncertainty which would follow from a decision that an honest creditor, who had gotten an honest debt, was liable to be sued and compelled to repay, would be so great, would make the settlement of estates so uncertain, and so interminable, that we think the plaintiff ought not to recover.

Judgment affirmed.

The principle here laid down is adopted in subsequent Pennsylvania decisions, being differently worded in different cases. In *Presbyterian Corporation v. Wallace*, 3 Rawle, 140, it is thus expressed: "A creditor who has received satisfaction in the usual course is not bound to refund, because the money can not be followed, except where it has been received *mala fide*." In *Heppard v. Beylard*, 1 Whart. 226, by Chief Justice Gibson: "Money can be followed only when it has been received *mala fide*, whence results a clear and indisputable rule of law, that when paid by mistake in discharge of a just debt, it may not be recovered back." In *During's Appeal*, 13 Pa. St. 240, by the same judge: "What a creditor has conscientiously received, he may conscientiously retain." The general doctrine is also cited and approved in *Boas v. Uppdegrove*, 5 Pa. St. 518; *Ege v. Koontz*, 3 Id. 114; *Hinkle v. Erhelberger*, 2 Id. 483.

FLEMING v. BEAVER.

[2 RAWLE, 128.]

AS BETWEEN A SURETY WHO HAS PAID A JUDGMENT against his principal, and a subsequent judgment-creditor of the principal, the former has preference.

ACTUAL PAYMENT DISCHARGES A JUDGMENT at law, but not in equity, if justice require that it should still subsist.

A SURETY PAYING A JUDGMENT against his principal is substituted by operation of law to the rights of the creditor.

IN error. The opinion states the case. Judgment below for the plaintiff.

Dunlop, for the plaintiff in error.

Findlay, *contra*.

By Court, GIBSON, C. J. The substance of this obscurely stated case is this: Pennell sold a house and lot to Guiger, and together with Hawbucker and Hartman (since dead, and represented by McCauley), executed a bond, with condition that the incumbrances should not be pressed faster than the purchase-money should grow due, to discharge them. Walker, a judgment-creditor, being about to proceed, McCauley paid him in cash, rather more than half the amount of the bond of indemnity to Guiger, and the residue thus: Finfrock had a judgment against Walker, in satisfaction of which, Hawbucker, McCauley, and Walker confessed a judgment to Finfrock, which, it was agreed by the parties, should be paid by Hawbucker, but which was levied on the goods of McCauley, and paid by him. Hawbucker's house and lot being sold on a judgment at the suit of Drucks, the question is, whether McCauley shall come on the fund in the hands of the sheriff, as a judgment-creditor under Finfrock; or, whether it shall be paid to Beaver, a subsequent judgment-creditor. It is clear that Hawbucker and McCauley stand in the relation of principal and surety, and a surety who has paid the debt is entitled to be substituted for the creditor. But a subsequent creditor, whose fund has been taken away by a prior creditor, is also entitled to be substituted. Hence, an argument that in the case at bar there is but equity against equity, and that the parties are to be left to their legal advantages. The parties are the principal, the surety, and the subsequent incumbrancers.

But the judgment-creditor had not a second fund in the hands of the surety; and even if he had, it is not easy to imagine on what principle of justice the surety would be bound to pay the debt in case of the principal, and for the benefit of a subsequent incumbrancer. Surety was not demanded for the benefit of any but those who were parties to the contract; and the advantages incident to it necessarily belong only to themselves. The right of the surety to be substituted in the first place is indisputable; and the question stands exactly as if the prior creditor himself were pressing his claim on this fund, without having pursued the surety to insolvency. That would not be required of him. The surety contracted on the credit of this

very fund; and being prior in time, he is prior in right, to a creditor who has acquired a claim on it subsequently. If such creditor could compel the surety to pay the prior debt, the effect would be precisely the same as if the principal had paid it, and the surety were compelled to pay the subsequent creditor; for as both debts would be satisfied, it could be of no consequence to the surety, whether his money were applied to the one debt or the other; and thus, it is obvious, his responsibility might be kept alive after the extinction of the debt, for which alone it was pledged. That can not be done.

Actual payment discharges a judgment at law, but not in equity, if justice require the parties in interest to be restrained from alleging it, or insisting on their legal rights. *Kuhn v. North*, 10 Serg. & R. 399, was the case of a voluntary payment of the debt of another, which, so far from creating an interest in the judgment to affect subsequent creditors, would not have sustained an action of *indebitatus assumpsit* against the debtor. There is an obvious difference between one who has voluntarily paid the debt of another, and one who has paid on compulsion, from having become surety at the instance of the debtor; which gives an equity, not only against the latter, but against every one else deriving title from him subsequently to the contract of suretyship.

As to the supposed inefficacy of the substitution attempted by the parties, and the alleged inability of this court to compel the creditor to assign the judgment, it is sufficient to remark that an actual assignment is unnecessary. The right of substitution is everything, and actual substitution nothing. By a fiction, to which we are indebted for nearly all our equitable jurisdiction, the law has made the assignment already; and hence, the right of the party entitled by no means depends on the willingness of the creditor to transfer the security. Here there is a clear right of substitution; and the surety having paid the debt, succeeds, by operation of law, to the rights of the creditor.

Judgment reversed, and judgment for the defendant.

TOD, J., dissenting.

HUSTON and SMITH, JJ., absent.

The surety's right to an assignment of the judgment which he has paid, in order to enforce the same against his principal, as here pronounced to exist, is recognized in *Burns v. Kincaid*, 3 Penn. 62; *Croft v. Moore*, 9 Watts, 455; *Foster v. Fox*, 4 W. & S. 94, where the chief justice quotes the phrase

"the right of substitution is everything, and actual substitution nothing:" *Lathrop's Appeal*, 1 Pa. St. 516, *et seq.*, where the doctrine is considered at length, and reaffirmed; *Morris v. Oakford*, 9 Id. 499; *Moore v. Bray*, 10 Id. 522; *Lloyd v. Barr*, 11 Id. 48; *Gearhart v. Jordan*, Id. 332; *Gossin v. Brown*, Id. 531; *Yard v. Patton*, 13 Id. 286. In *Rittenhouse v. Levering*, 6 W. & S. 190, 198, it is said: "The general proposition in *Fleming v. Beaver* is conceded with certain limitations which we have been compelled to make in subsequent cases. Thus, in *Fink v. Mahaffy*, 8 Watts, 384, it is held that the doctrine of substitution being one of mere equity and benevolence, will not be enforced at the expense of a mere legal right; a surety, therefore, whose claim against his principal for money paid on a judgment against them has been defeated at law, can not be substituted for the plaintiff in the original judgment."

PAYMENT WHEN A SATISFACTION OF A JUDGMENT: *Head v. Gervais*, and note, 12 Am. Dec. 582.

STUMP v. FINDLAY.

[2 RAWLE, 168.]

A DEVISE TO A. DURING HIS NATURAL LIFE, and after his decease, leaving lawful issue to his heirs, as tenants in common and their respective heirs and assigns forever, but in case of A.'s death without lawful issue then to B. to his heirs and assigns forever, gives to A. a life estate; and his issue, as tenants in common, and B. respectively take contingent remainders, only one of which could ever become vested, and that only on A.'s death.

IN A COMMON RECOVERY, the tenant to the *procipe* must be tenant by a legal title; if his title rest only in articles of agreement, the recovery is void.

A COMMON RECOVERY, WHETHER VALID OR VOID, works a forfeiture of the particular estate.

IN error. Ejectment. The opinion recites the facts, the language of the devise of 1783, in the will of John Findlay, sen., being: "I give and bequeath to my son John Findlay, all that plantation and tract of land whereon I now dwell, together with the appurtenances, to hold to him, the said John Findlay, during his natural life. And after my son John's decease, if he shall die leaving lawful issue, I give and devise the same to his heirs, as tenants in common, and their respective heirs and assigns forever. But in case my said son John shall die without leaving lawful issue, I give and devise the same to my son James Findlay, to hold to him, his heirs and assigns forever." Verdict for the Findlays, the plaintiffs below.

G. Chambers and J. Chambers, for the plaintiffs in error. The draft was not provable by parol: *Miller v. Carothers*, 6 Serg. & R. 215. The settlement was limited to three hundred acres: *Davis v. Keefer*, 4 Binn. 161; *Gordon v. Moore*, 5 Id. 136; *Ellis*,

Different Agents, 2 Smith, 167. The devisee's children were barred by the common recovery. *Findlay v. Riddle*, 3 Binn. 139; *Loddington v. Kime*, 1 L. Raym, 203; 2 Bl. Com. 171. The recovery in any event wrought a forfeiture: 4 Cruise, Recovery, c. 3; 1 Id. 94, Estate for Life, sec. 99; 4 Com. Dig., Forfeiture, A. 2; 4 Cruise, 504; *Lyle v. Richards*, 9 Serg. & R. 329.

Dunlop and McCullough, contra. The original draft was lost; it was evidence of a survey on Kerr's warrant: *Boyles v. Johnston*, 6 Binn. 126; *Sproul v. Plumsted*, 4 Id. 189; *Miller v. Carothers*, 6 Serg. & R. 215; *Leazure v. Hillegas*, 7 Id. 313; *Hoover v. Gonzalus*, 11 Id. 314. A settlement is not limited to three hundred acres. If there was error, it has worked no injury to the defendants below, and is therefore not ground for reversal: *Gibbs v. Cannon*, 9 Serg. & R. 202 [11 Am. Dec. 699]; *Graham v. Moore*, 4 Id. 467. The common recovery was void; and unless it were good there could be no forfeiture of the life estate: *Swann v. Broom*, 3 Burr. 1596; 2 P. Wms. 177; 3 Id. 363; *Warren v. Greenville*, 2 Str. 1129; *Case of Lord Say and Seal*, 10 Mod. 40; *Bridges v. Duke of Chandos*, 2 Burr. 1065; *Lyle v. Richards*, 9 Serg. & R. 343.

By Court, GIBSON, C. J. The essential facts of the case are these: In 1765, John Findlay claimed five hundred acres of land, including the premises in dispute, on a warrant for one hundred acres, and had procured Samuel Lyon, an assistant of the deputy surveyor, to make a survey of his claim; a rough draft of which, without date, or reference to any authority, or office title, was found in the office of the deputy. In 1786, he conveyed two hundred and eight acres to his son James, and in 1783 devised the residue to his son John, for life, with concurrent contingent remainders to the issue of John, and their heirs, as tenants in common; and in the event of John's leaving no issue, to James in fee. The plaintiffs claimed as the children of John. The defendants claim paramount the will; and they also resist the title of the plaintiffs under the will, on the ground that the contingent remainder limited to them was barred by a common recovery suffered by John, the tenant of the particular estate. The paramount title is this: In 1785, several years after the death of the testator, James, his son, obtained a warrant, in the name of his own son, John, for two hundred acres, part of the land devised: and in 1790 had a survey of one hundred and thirty-two acres made on it, against the acceptance of which, John, the devisee, entered a caveat in

1791. But in 1793, this same John, by articles with his brother and nephew, in which he declares that he claims the land, agrees to purchase their title for twenty pounds. Under this title, eleven acres are conveyed in 1794 to Meyers (one of the defendants) in fee; and in 1797, the residue is articulated to be sold to George Hetich, from whom, after he had suffered the common recovery, whose effect on the contingent limitation to the plaintiffs forms the second branch of the inquiry, title is regularly deduced to Stump, another of the defendants; the other defendant is their tenant. The first question, therefore, is, whether a party who claims under John, the devisee, can set up a paramount title in opposition to the provisions of the will. And I am of opinion he can not.

I am at a loss to imagine a clearer case of election. In courts of law, as well as of equity, no one can claim under a deed without claiming under the whole of it, or take one clause and reject the rest; the whole must be confirmed, or the whole abandoned. Just so of a will. If the testator devise the estate of Titus to another, and give Titus a legacy, Titus shall not hold the estate and claim the legacy; he shall not take a benefit under the instrument without suffering the whole of it to take effect. And it is immaterial whether the testator believed he had a right to dispose of the estate of Titus, or intended to assume an arbitrary power. If Titus will avail himself of his bounty he shall not disappoint his will: 7 Wils. Bac. ap. 445; 2 Mad. Ch. 40. With the exception of a single case, the doctrine in regard to wills has been held as broadly as I have stated it, from *Noys v. Mordaunt*, 2 Vern. 581, to the present day. In the excepted case, *Forrester v. Cotton*, Amb. 388, it is true Lord Keeper Henly expressed great doubt, whether such a condition (as he called it) can be coupled with a partial estate, as the devise would be good, or otherwise, just as the devisee in remainder should submit to the will. I trust it will be considered no disrespect to say, the doctrine was then newly sprung up, and its principles were perhaps imperfectly explored; for it is certainly now held that the equity, in cases of election, instead of being a condition which if not performed induces a forfeiture, is to sequester the devised interest, till satisfaction be made to the disappointed devisee: 2 Mad. Ch. 4. And, beside, I take the principle in *Forrester v. Cotton* to have been since overruled. Such, then, being the rule, is the case before us within it? A testator devises an estate to his son for life, who enters and enjoys the whole of it; but who, afterwards, acquires an adverse

title to a part of it in fee; declaring, at the same time, that he already has a title under the will.

After this, will it be endured, after he shall set up this adverse title against the title of the testator? It would be a shame and a scandal if he could. It was his duty to perfect the testator's title for the benefit of himself and those in remainder instead of colluding with an adverse claimant, who probably was his creature to defeat it. The devise of the whole was in confidence that the devisee would do no act to defeat the testator's intention, as to any part, and the devisee, having elected to take under the will, shall not be permitted to claim in repugnant rights. John, the devisee, therefore, must be taken to have made the purchase in aid of his former title, and in trust for those beneficially entitled under the limitations in the will. This view of the first branch of the defense supersedes all inquiry into the grounds of the first two errors; because the title set up by the defendants, being the title of the plaintiffs, if not barred by the recovery, it is immaterial whether there was an abstract error in admitting a witness to prove the contents of a survey, or in charging that the draft was evidence of an equitable right under the testator's settlement; and that he was entitled to more than three hundred acres. All this was obviated by the fact that there was an available title, under the warrant and survey, in the name of John, the son of James; and that the defendants would have been estopped from denying the title of the testator were it otherwise.

Then, as to the effect of the common recovery, John Findlay, the devisee, having a son then living, entered into articles for the sale of the premises, to George Hetich, against whom, and Samuel Riddle, Joseph Parks brought a writ of entry; the tenants vouching John Findlay, and he vouching over the common vouchee, against whom judgment was rendered by default. The demandant then conveyed to John Findlay in trust, for Hetich and Riddle, from whom the defendants regularly deduce their title; and the first objection by the plaintiffs is, that the recovery was void for want of a good tenant to the *præcipe*. It is an elementary principle that the party against whom the writ is brought must by right or by wrong have an estate of freehold at the time of the judgment. Here there was nothing but an agreement, and one which the tenant, not having paid the purchase-money which was to precede the conveyance, had not even a right to have executed.

In a case of this sort there is no such thing as an equitable

tenant to the *præcipe*; for although in an adversary proceeding we will, to prevent a failure of justice, consider those things as already done which chancery would compel a party to do, there is no necessity for extending the rule to common recoveries which are not adversary proceedings. Their effect in barring contingent remainders is exclusively technical, and *strictissimi juris*; and, as there are no equitable considerations to recommend them to indulgence, the tenant for life escaping personal chastisement only because there is no trust in the case to give a chancellor jurisdiction: Co. Lit. 290, b, note, 249, the parties ought to be held closely to technical form. But even a conveyance would not have made the recovery lawful, as John Findlay was a bare tenant for life, and by the form of conveyance usual here, could have passed no greater estate than was in him; so that, by the statute 14 Eliz. c. 8, the recovery would still have been void for want of a subsequent estate of inheritance in the tenant. Something was said at the argument of presuming a conveyance of an estate of inheritance from lapse of time; but I believe no case of the kind is to be found. After a very long possession the surrender of a precedent lease for life, to enable a remainder-man in tail to make a tenant to the *præcipe*, has been presumed; but never after a lapse, as here, of only fifteen years. Something was also said about the recovery being good till reversed by writ of error. It is certain, however, that it may be abated by entry and plea, and consequently in an action of ejectment; the law being so laid down, both in Booth on Real Actions, 77, and Pigot on Recoveries, 156. The question, therefore, is whether a void recovery, such as this, will bar a contingent remainder.

A recovery produces such a bar by working a forfeiture of the particular estate. Previous to statute 32 Hen. VIII., c. 31, a recovery barred even vested remainders by enlarging the particular estate to a fee; in consequence of which vested estates were turned to a right, and contingent ones irremediably destroyed. But by that statute, and 14 Eliz., which has superseded it, a recovery suffered by a bare tenant for life is utterly void. Still, however, it was held, in *Pelham's case*, 1 Rep. 15, to work a forfeiture of the particular estate, and consequently the destruction of all remainders depending on it. It is said not to have produced that effect here, because it was void for want of a good tenant to the *præcipe*. But it would have been equally void with a good tenant to the *præcipe*. The objection would be unanswerable in the mouth of a tenant in tail, who

can be only barred by a valid recovery; but it is of no avail in the mouth of a contingent remainderman, where the particular estate is not an estate tail, because he can be barred by no recovery which is valid.

In delivering the opinion of the judges in *Dormer v. Parkhurst*, 3 Atk. 135, Chief Justice Willis said, there are many cases where an act may be void against another, and yet be a forfeiture to the person; and he gave, as an instance, the case of a copyhold tenant, a lease by whom is certainly void, but nevertheless a forfeiture; so in the case of a fine. Here the offense of the tenant of the freehold consisted in suffering himself to be vouched without counter-pleading the warranty; thus attempting, by matter of record, to convey a greater estate than was in him, the consequence of which is indisputably a forfeiture. But as the tenant for life had a child born before the recovery was suffered, it is argued that the remainder vested in such child, subject to open and let in after-born children. In cases where the remainder was expressly limited to children, such a construction has prevailed; and had the intention clearly been to vest the estate in the children of John, in any event it would have prevailed here.

After the devise to John for life, the words are: "And after my son John's decease, if he shall leave lawful issue, I give and devise the same plantation and tract of land to his heirs, as tenants in common, and their respective heirs and assigns forever. But in case my son John shall die without leaving lawful issue, I give and devise the same plantation and tract of land to my son James Findley, to hold to him and his assigns forever." The word heirs is to be qualified so as to mean issue, it being plain, from the context, that both these words were used in a sense, neither so extended as to amount to words of limitation, nor so restricted as to mean children. The general intent was to give the estate to James in the event of John's leaving no descendant. But this intent would be frustrated by the death of a child in whom the estate vested, and who had died without issue in the life-time of John; for after a vested estate in fee, no further limitation can take effect but by way of executory devise. Where two contingent remainders in fee depend on the same particular estate, both can not take effect, as both depend on the same contingency, according to the happening of which, the one is to take effect in exclusion of the other. This is the familiar case of a single contingency with a double aspect. But the construction contended for contem-

plates two distinct contingencies, the birth of issue, in whom the estate would vest in the life-time of John, and the extinction of such issue, on which it would go over at his death. But the latter could, as I have said, take place only by holding the limitation to James to be an executory devise, which we can not do, as there is a preceding freehold on which it may depend. As, then, we have two contingent remainders, which depend on one contingency, and both can not take effect, there is no way to give effect to the general intention of the testator, but to fix the time for the happening of the contingency at the expiration of the particular estate. The consequence is, I am bound to pronounce that the plaintiffs are barred.

Judgment reversed.

Followed on the general proposition that a party shall not contest the validity of an instrument from which he derives a benefit, in *Trustees of Bank of U. S.*, 2 Par. 146; *Preston v. Jones*, 9 Pa. St. 460; and cited in *Campbell v. Kent*, 3 Penn. 30, as deciding that a common recovery may be abated by entry and plea.

MILES v. RICHWINE.

[2 RAWLE, 199.]

A SHERIFF HAVING AN EXECUTION against a defendant can not discharge the latter from liability to the plaintiff, by giving to the defendant a receipt for the amount of the judgment in consideration of the settlement of a private indebtedness due from the sheriff to the defendant.

Writ of error. The plaintiff in error was defendant below. Case stated for the opinion of the court. Richwine, having obtained judgment against Miles, sued out an execution and placed it in the hands of one Monks, a constable. Miles was also a constable of the same borough with Monks, and was a creditor of Monks. The latter, in settlement of his indebtedness to Miles, gave to him a receipt in full for the amount due on the execution. No money was paid in satisfaction of the execution. The question was as to the liability of Miles, Richwine having sued out a *scire facias* to show cause why execution should not issue on the original judgment. Monks was insolvent.

Watts, for the plaintiff in error, urged that a constable could give a valid receipt without money received, and that he was alone made liable thereby.

Penrose, contra, was stopped by the court.

By Court, GIBSON, C. J. It is settled that an officer can not apply an execution in his hands to the satisfaction of his own debt. In *Codwise v. Field*, 9 Johns. 263, the coroner having a *capias ad satisfaciendum* against the sheriff, to whom he was indebted, gave him a receipt in full, and engaged to settle the amount with the plaintiff, but failed to do so; and it was held that this arrangement did not discharge the execution, actual payment alone being competent to produce that effect. So, in *The Bank of Orange v. Wakeman*, 1 Cow. 46, where a sheriff's deputy took the defendant's negotiable note, gave a receipt, and returned the execution satisfied; it was determined that the defendant was still liable. As regards the debt due by Monks to Miles, on his own right, these cases are exactly in point. But the case of two constables agreeing to set off executions in their hands, against each other, is clearly within the principles established by them, inasmuch as such an arrangement would substitute the officer for the defendant. It might not, therefore, be an idle ceremony, as it has been called at the bar, to enforce the payment of money on the one execution, to have it paid back the next moment on the other. If one of the defendants were insolvent, and the other not, the set-off would effect an injurious change of liability by substituting an insolvent constable for a solvent defendant; and so, *vice versa*. To avoid this, and other mischiefs, the law would not endure the mingling of private transactions with official duties. Had Monks collected the money on the plaintiff's execution, he might, no doubt, have embezzled it, but he might also have proved faithful to his trust; and in the worst event, the plaintiff could have been reduced only to the situation in which the attempted arrangement, had it been successful, would have left him. Miles, therefore, can not be permitted to obtain his debt from Monks, and at the same time pay a judgment-creditor at the expense of the plaintiff.

Judgment affirmed.

Followed in *Chambers v. Miller*, 7 Watts, 63, where the principle that a sheriff can not mingle his private affairs with his official duties, is applied to a receipt given by the plaintiff's attorney for the amount of the judgment, without actual payment, in consideration of a private transaction of the attorney with the defendant; in *Irwin v. Workman*, 3 Watts, 357, 362, where the sheriff, in an action for money collected on an execution, sought to set off a supposed lien on such fund in favor of the plaintiff's attorney for his fees, which lien had been assigned to the sheriff, in *Coffman v. Hampton*, 2 W. & S. 377, where a purchaser at a constable's sale was not permitted, in an ac-

tion on the bid, brought by the constable, to set off a sum due from the constable to him as landlord; and in *Fück's Appeal*, 10 Pa. St. 460, where a sheriff was decided to have no claim to the surplus of money collected on a *f. fa.* by reason of a private debt due him from the defendant.

McCoy v. Scott.

[2 RAWLE, 222.]

AN ADMINISTRATOR HOLDS THE RENTS and profits of the real estate of his intestate, as trustee for the heirs, not for the creditors.

RIGHT OF THE HEIRS TO THE LAND is as absolute as that of their ancestor, until divested by a sale by the administrator, under an order of the orphans' court.

IN error. The opinion states the case.

By Court, ROGERS, J. Although lands in Pennsylvania are considered as chattels for the payment of debts, yet in the case of an intestacy, the real estate goes to the heirs, and the personal estate to the legal representatives. The security exacted from the administrator has reference to the value of the personalty, as was decided at Sunbury, when we held that the surety in an administration bond was not liable for the real estate. When lands are wanted for the payment of debts, there is a mode pointed out by the act of assembly, which the administrator is bound to pursue, for the real fund is not absolutely, but *sub modo*, assets in his hands. Until this proceeding takes place, the administrator has nothing to do with the real estate; and this I believe to be the universal understanding of the profession, and has on several occasions received the sanction of this court. The administrator, McCoy, collected the rents and profits of property which had been leased by the intestate in his life-time; and the question is whether the administrator be a trustee for the creditors or heirs. We are of the opinion the money was received for the benefit of the heirs. It is objected that this impairs the rights of the creditors, but this will depend upon the question, To whom does the law adjudge the right to the money arising from the rents and profits? For, as it will be observed that this money was received by the administrator, without any authority from the orphans' court, it will be considered to have been received for the benefit of those to whom of right it belongs. The creditors have two remedies: they may either proceed to sell the estate themselves, by judgment and execution, or they may await a sale to be made by

the administrator, under an order of an orphans' court. It is a benevolent principle of law, that, until this be done, the widow and children shall not be altogether destitute of support. The law does not place them absolutely at the mercy of the administrator.

If the administrator can interfere with the rents and profits for the use of the creditors, it would be his duty to do so, and it would be at the peril of the administrator if the widow and children were suffered to remain on the premises; for in case of an eventual deficiency of assets, he would be guilty of a *devastavit*. Justice, then, to himself, would make it necessary, in all cases, where there was a chance of insolvency, to exact security from the widow and children, which has not yet been done, and, indeed, in many cases, produces misery and distress. Until the administrator has settled his administration account, it can not be known what debts against the intestate will remain unpaid. Nor until the administrator has thought proper to pursue the mode pointed out by the act, to possess himself of the real fund, or the creditors to proceed for recovery of their debts, can it certainly be known whether the real estate be wanted for the payment of the debts, or whether the personal estate will not be sufficiently abundant for that purpose. Hence it is, that when the heirs receive the rents and profits, or live on the land, and cultivate the soil, and expend the proceeds in the maintenance of the family, under an idea, which proves unfounded, that the property is their own, to compel them to refund would sometimes be attended with utter ruin, and almost always with great inconvenience.

It is a strong argument with me that in cases of such common occurrence, not one has been produced where the heir has been charged with the rents and profits received, or money made by the cultivation of the real estate. The heir takes the place of his ancestor, in regard to the land, subject to the liens which bind the fund, but not its profits. If the creditors wish to receive the proceeds of the real estate, they must proceed themselves, or get the administrators to do so; and there is no hardship on the creditors to compel them to use legal diligence in resorting to a fund which is only pledged *sub modo* in payment of the debts of the deceased. If, by their neglect, they have betrayed the family into a false confidence, on them be the loss. They have no right to complain when they have a remedy in their own hands. As the land goes into the possession of the heir, he has a right to take the necessary estovers. If a tres-

pass be committed, he must commence suit; the damages would be his absolutely, which seems to show that he is the owner of the fee-simple, as were his ancestors, subject to be defeated by an enforcement of the claims of the creditors, or a demand made in due form by the administrator of the real fund for payment of debts. In England, when suit is brought against the heir, on the obligation of his ancestor, execution goes against the lands which are sold, the proceeds of which belong to the creditors; the intermediate profits remain with the heir, who is not bound to account for them, and in conformity with this has been the practice in Pennsylvania. The heir is considered the owner of the land, subject to the liens which are ascertained as attaching on the land, either by the administrator, or by suit brought by the creditors. Until these proceedings are resorted to, the right of the heir is as absolute as the right of his ancestor.

Judgment affirmed.

HUSTON, J., dissenting.

Regarded as authority in *Schwartz's Estate*, 14 Pa. St. 47; *Adams v. Adams & Watts*, 163; *Torr's Estate*, 2 Rawle, 254; and in *Kreider v. Kreider*, 1 Miles, 222, on the point that the rents and profits of the real estate collected by the executor or administrator, are a fund held in trust for the heirs or devisees, and not for the creditors.

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

STODDARD v. MARTIN.

[1 RHODE ISLAND, 1.]

WAGERS AT THE COMMON LAW were legal, and might be enforced, unless they were against public policy, or of an immoral tendency, which affected the feelings, interests, or character of a third party, or tended to disturb the peace of society.

WAGERS UPON THE RESULT OF AN ELECTION give to one party a pecuniary interest in the election of a person to office, and to another the same interest in such person's defeat; consequently, such wagers are against public policy, and therefore invalid.

ACTION upon the case to recover of the defendant fifty dollars, being the amount of a wager made by plaintiff and defendant upon the result of the election of one Ashur Robins to the United States senate. Checks on a certain bank for said amount were deposited by said parties in hands of a stakeholder, and upon the result of the election being ascertained, plaintiff presented the defendant's check for payment, but the bank refused to pay the same. The jury found a special verdict, to the effect that neither plaintiff nor defendant were members of the legislature of the state, by whom the election was made, but that they were both citizens thereof; also, that plaintiff won the bet. The questions of law arising upon the special verdict were reserved for the consideration of the court, which, after argument, gave judgment to the defendant for his costs.

By Court, ENDR, C. J. It is admitted that by the common law, some wagers are legal and may be enforced in a court of justice. This admission is made with regret in many of the modern decisions; and were the question *res integra*, there is little doubt that all wagers would now be declared illegal.

Among wagers deemed illegal, are those against sound policy, or of immoral tendency, which may affect the feelings, interest, or character of a third party, or tend to disturb the peace of society.

In the case of *Gilbert v. Sykes*, 16 East, 156, an action on a wager on the life of Bonaparte, Lord Ellenborough says: "Wherever the tolerating any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held void." And after, in nearly the same words: "If a contract have a tendency to a mischievous and pernicious consequence, it is void." And again: "Where the subject-matter of the wager has a tendency injurious to the interests of mankind, I have no doubt in saying that it ought not to be sustained." In the same case Le Blanc, J., says: "It has often been lamented that actions upon idle wagers should have been maintained in courts of justice. The practice seems to have prevailed before that full consideration of the subject which has been had in modern times, and it is now clearly settled, that the subject-matter of a wager must at least be perfectly innocent in itself, and must not tend to immorality or impolicy." In the same case, Bailey, J., speaking of the wager then under consideration, says: "It gives to one person a pecuniary interest in the violent death of another, by whatever means procured." "Shall it be allowed to a subject to say," says Lord Ellenborough, in the same case, "that the moral duties which bind man to man are in no hazard of being neglected when put in competition with individual interest?"

If we apply these principles to the question before us, there can be little doubt what the decision ought to be. The wager was on the election of a certain person, by the general assembly, to the office of senator in congress. Did it not give to the plaintiff a *pecuniary interest* in the election of that person? and to the defendant an equal pecuniary interest in preventing that election? "And shall it be allowed to" either party, or any one else, "to say," that in this case "the moral duties which bind man to man," or to communities of men, "were in no hazard of being neglected when" thus "put in competition with individual interest?"

If a contract have a tendency to a mischievous consequence, it is void. What is the tendency of a wager on an approaching election? Is it to produce peace, harmony, fair dealing? Or is it not rather to produce clamor, misrepresentation, abuse, discord; the exertion of improper influence; of intrigue, bargain,

and corruption; of the use of *means*, by each party, fitted to the end, that is, the winning of the bet? And is not this tendency greater, in proportion to the amount of the wager, and the influence of the parties to the wager? To say, that because the parties to a wager are not members of the legislature, by whose vote the wager will be decided, therefore the wager can have no influence on the members of the legislature, is to say, that the power and influence of individuals out of the legislature can, in no case, affect the vote of that legislature, however great the power and influence of those individuals may be. Which is to say, what is in itself absurd, what daily experience teaches to be false, and what a moment's reflection must convince every one, is not and can not be true. If the tendency of the wager, in the case before us, be thus, then is that tendency immoral; for no one, it is believed, will so far hazard his own reputation for correct moral feeling, so as to undertake to reconcile misrepresentation, slander, intrigue, or corruption with the principles of morality. We might then safely say, it is contrary to sound policy, because immoral. But it is contrary to sound policy in a more important point of view. More important, because the immoral tendency and pernicious bearing on our free institutions, is more extensive and injurious. The stronghold of freedom in our country is in the freedom of our elections. Destroy this, and our freedom is at an end. Whatever tends to this destruction, in the remotest degree, ought to be resisted here with a determination that admits of no compromise. Wagers on elections, whether by the people or the general assembly, have this tendency directly. And this tendency, in a given case, is in proportion to the interest at stake, and the influence of the parties to the wager. To say that a wager can have no influence in such a case is to say, either that a man has ceased to regard his own interest, or that interest has ceased to influence man's conduct. This interest and influence may result in the grossest corruption. It is enough for the decision of this case to show that a wager on an election has this tendency. Can it be necessary to ask whether, in a free country, a contract which has a tendency to destroy freedom of elections and produce corruption, is consistent with sound policy? In *Vischer v. Yates*, 11 Johns. 31, which was an action against a stakeholder, of a bet on an election, Kent, C. J., in delivering the opinion of the court, says: "We choose rather to place the decision of this case upon those great and solid principles of policy which for-

bid this species of gambling, as tending to debase the character and impair the value of the right of suffrage."

There is one other point of view in which this case may be considered, and in which this wager will appear equally indefensible. If the feelings, interest, or character of a third party may be affected by a wager, or if it tend to disturb the peace of society, it can not be sustained: *Da Costa v. Jones*.¹ If the election in question had taken place by a majority of one vote, and that vote had been procured by bribery, would the wager have been fairly won? And if not won, ought not the defendant to be permitted to show it, and avoid the payment? But would a court of law inquire into a transaction so full of interest and feeling to third parties, in order to decide an "idle wager?" No; nor would it comport with sound policy to suffer such a question to be discussed in a court of law on a mere wager, independent of the feelings or interest of third parties. In the case of *Da Costa v. Jones*, Cowp. 720, Lord Mansfield, stating as a case a wager that an unmarried woman has a bastard, says: "Would you try that? Would it be endured? Most unquestionably it would not, because it is not only an injury to a third person, but it disturbs the peace of society, and the party to be affected by it would have a right to say, How dare you bring my name in question?" With how much more propriety might the parties charged with corruption, in the case above supposed, put the same question! And how much greater would be the tendency in that case to disturb the peace of society!

In the case of *Bunn v. Riker*, 4 Johns. 428 [4 Am. Dec. 292], which was a wager on the election of the governor of the state, Van Ness, J., says: "It may involve an inquiry into the validity of the election of the present chief magistrate." In answer to the objection that the certificate of the canvassers would be conclusive, he says: "It is enough that this wager may give birth to such a question, to pronounce it to be repugnant to the dictates of good policy." "It is a discussion calculated to endanger the peace and tranquillity of a community." These principles are fully recognized in the case of *Lansing v. Lansing*, 8 Johns. 454, which was a similar bet, made after the polls were closed. Say the court: "This case falls within the principle laid down in *Bunn v. Riker*, that a bet, involving an inquiry into the validity of the election of governor, was void on principles of policy."

With these principles, as well as those quoted from the other

1. *Da Costa v. Jones*, Cowp. 720.

authorities, whether binding on this court as authorities or not, we fully concur, and have no hesitation in saying that all bets on elections, whether by the people or the general assembly, and all bets on judicial decisions, are of immoral tendency, against sound policy, and ought not to be sustained, especially in this state, where all our officers, judicial as well as others, are of annual appointment.

The illegality of wagers made upon the result of elections is considered in the note to *Buen v. Riber*, 4 Am. Dec. 299. See, generally, as to what wagers are valid, and when actions may be maintained thereon, *Downs v. Quarles*, 12 Id. 339, and the authorities there cited; also, *McAllister v. Hoffman*, 16 Id. 556. A wager on the result of an election is invalid, though made after the election, but before the canvass is completed: *Bust v. Gott*, 18 Am. Dec. 497, and note thereto.

CASES
IN THE
COURT OF APPEALS
OF
SOUTH CAROLINA.

LYLES, ORDINARY, v. McCLURE.

[1 BAILEY'S LAW, 7.]

DECREE OF ORDINARY, REQUISITES OF.—A decree of the ordinary, which adjusts the accounts of an administrator and determines the amount due, is sufficient, without ordering such amount to be paid.

EXTENT OF ORDINARY'S JURISDICTION.—The ordinary has authority merely to settle accounts, but has no power to compel payment of the amount found due.

THE COURTS OF LAW WILL NOT ENTERTAIN ACTION ON ADMINISTRATION BOND until the state of the account is ascertained by decree of the ordinary.

ACQUIESCENCE IN DECREE OF ORDINARY SETTLING ACCOUNT of administrator warrants the presumption that all matters properly cognizable before him, were there adjusted and settled.

DEBT on an administration bond. The pleas were, the general issue, and performance, to the latter of which the plaintiff replied a decree of the ordinary ascertaining a sum to be due by the defendants. Rejoinder, no such decree; on which issue was joined. The bond was executed by the defendant, Mrs. McClure, *dum sola*, conditioned for the faithful administration of the estate of James Clifton, deceased, whose widow she then was. She afterwards married the other defendant, McClure, and this action was brought to recover the distributive share of Susannah, one of the children of James Clifton, in his estate. The guardian of Susannah Clifton had previously obtained a decree of the ordinary, which recited that the defendants had been duly cited; that one of them appeared, and the other made default; and that the ordinary thereupon proceeded to settle

the estate, and ascertained a certain sum to be due from the estate to Susannah Clifton. On the trial, the defendants objected that this decree was incomplete, uncertain, and insufficient, because it did not contain an order that the defendants should pay the sum specified, nor even state that it was due by them. They moved for a nonsuit on this ground, which the court refused. The defendants then offered to give evidence of a discount of which the plaintiff had due notice. The discount consisted of charges for boarding, clothing, schooling, and maintaining Susannah Clifton. It was objected to on the ground that it was properly cognizable by the ordinary, and ought to have been substantiated before him. The judge sustained this objection, and the jury found for the plaintiff the amount of the decree. The defendants appealed, and renewed their motion for a nonsuit, or for a new trial.

Williams, for the motion.

Mills, contra.

By Court, JOHNSON, J. 1. As to the nonsuit. In the absence of any statutory or other positive regulation, each department of the judiciary must be left to adopt and pursue its own formula in its proceedings; because neither of them has the power to prescribe in these matters for the others. With respect to matters of substance, there are certain requisites, however, which equally apply to every jurisdiction, and without which legal proceedings would be useless and unnecessary. In addition to the ordinary circumstances of time and place, they should, for the most obvious reasons, exhibit the parties, the subject-matter in dispute, and the result. These facts being ascertained, the legal consequences follow of course, whatever may be the phraseology used; and where forms are not prescribed, it is the most that can be expected from the subordinate tribunals, where, for the most part, the proceedings are conducted by the parties themselves, and before judges unused to, and uninformed in the technicalities and subtleties of pleading. As administrators, it was incumbent on the defendants to account before the ordinary, and to pay over to the persons legally entitled, the money in their hands. And these are amongst the leading creditors of an administration bond. The ordinary is authorized to take and adjust the accounts; but there his powers end. He has no authority to enforce the performance of any order or decree which he might make. It would follow, therefore, that his judicial powers ended with his ascer-

taining the sum due, and that any superaddition could only be directory, without any legal effect or operation, and was not indispensable to the perfection of the record. In the case under consideration, the sum due by the defendant was ascertained in an account before the ordinary; and the liability of the defendant to pay it was a legal consequence, and did not depend on the order or decree of the ordinary enjoining it on him. The evidence was, therefore, properly admitted, and conclusive of the question.

2. As to the motion for a new trial. The evidence offered in the form of a discount, consisted of charges against Susannah Clifton, for whose benefit the action was brought, for boarding, clothing, tuition, etc., to the amount of more than three times the sum claimed to be her interest in the whole personal estate. Before the appointment of a guardian, it was the duty of the defendants, as administrators of the estate of James Clifton, to provide for the wants and necessities of his infant child, Susannah Clifton, and any appropriation of the funds to those objects was in the course of their administration, and constituted a charge upon that part of the funds which belonged to her; of necessity, therefore, in their account before the ordinary, it became a proper and indispensable matter of account, and from their acquiescence in the decree of the ordinary, it will be presumed that all matters properly cognizable there, were fully adjusted and settled.

The courts of law have invariably refused to entertain actions on administration bonds, until the state of the accounts is ascertained by a decree of the court of ordinary; and the reason on which the rule proceeds, is, that from the organization of the courts of law and the established mode of proceeding, which excludes the evidence of the parties, they are incompetent to investigate such matters of account. This objection has, it is true, been usually interposed against the right of the plaintiff to proceed, but the principle equally applies to a similar matter of defense. The reason applies as strongly to both. The evidence offered was, therefore, properly rejected, and the motion for a new trial must also be refused.

Motion refused.

ROWLAND v. WOLFE.

[1 BAILEY'S LAW, 56.]

RIGHT OF WAY BY PRESCRIPTION.—To establish a right of way by prescription, the use must be shown to have been adverse to the owner of the land.

TRESPASS on the case for obstructing plaintiff's way over the land of the defendant. The plaintiff claimed by prescription, and proved that he had used the road for more than thirty years. One witness knew the road for forty years, and another had known it for forty-seven years, during which period its course had never been altered, until the obstruction by the defendant, for which this action is brought. Witnesses thought it was a "settlement road" for the use of the neighbors; had never heard it called a public road. The plaintiff offered to prove by one of the commissioners of roads, that the board had refused to open it, because it was not a public road, and they had no authority over it. Defendant objected to this evidence, and the court sustained the objection. The judge charged the jury that the evidence established that the road in question was a public highway rather than a private road; that the plaintiff had not shown an exclusive right in himself nor in any one else; that the road was open to all who passed in that direction, and there was no evidence to show that one had a better right than another; that if it was a public road, a private action would not lie for obstructing it, unless there had been some special damage sustained, which was not charged in this case; and that the remedy was by indictment. The jury found for the defendant, and the plaintiff moved to set aside the verdict, and for a new trial.

Irby and Bobo, for the motion.

Henry and Earle, contra.

By Court, NORR, J. This case was submitted to the jury upon the evidence, merely to determine whether the road in question was a public high road or a private way. The jury have found a verdict for the defendant. We have not the record before us, and therefore do not know whether the jury have, in so many words, found that it is a public highway, or whether that is only an inference drawn from their having found for the defendant. But I do not consider that an important inquiry. If it must be considered either one or the other, I think the

preponderance of evidence in favor of the verdict; the defendant certainly did not show any exclusive right in himself. But I am inclined to think it ought to be considered as a convenient thoroughfare, which the people of the neighborhood made use of by the permission or acquiescence of the owner of the soil, rather than a public highway, over which every one might claim a right to pass. Most of the old roads in this country were, as they must be in every new and unsettled country, laid out by accident, or as convenience might direct, without the sanction of public authority. They were afterwards altered, changed, or entirely discontinued, as population advanced, or as necessity or convenience required. The road in question appears to me to be one of that description. It has become so unimportant as not to be considered worthy the attention of the commissioners of the roads; but has, nevertheless, remained a public neighborhood road, common to all who have thought proper to travel that way. It has been convenient for the plaintiff, in passing from one plantation to another, to travel along that road; but there is no evidence to show that he has any exclusive right. No man has a right to appropriate the property of another to his own use.

A right of way over the land of another is an accommodation, which no one can claim without an equivalent. A right by prescription is founded on a presumption that a grant once existed, which has been lost by lapse of time. But lapse of time is not alone sufficient to afford such a presumption. The use must be adverse to the claim of the owner of the land. Merely passing over an uncultivated and uninclosed forest, which is common to every one, can not, by any lapse of time, give a right to any individual. To determine a question of this sort we must look to the situation of the country and the habits of the people. We know that it is an indulgence allowed to everybody, by the universal consent of the country, to make roads through uninclosed lands in any direction, without any kind of restraint. But no one ever dreamed that by this kind of courtesy a neighbor might, by and by, claim a right to such a road, to the exclusion of the owner of the soil. Such a use is not adverse. It deprives the owner of no right, and subjects him to no inconvenience. A privilege thus enjoyed can never be claimed as a right; whether we consider this, therefore, as a common highway, belonging to the public, or a mere thoroughfare allowed to the neighborhood by the courtesy of the defendant, the

plaintiff has no such right as will enable him to maintain an action; and the motion must, therefore, be refused.

Motion refused.

To establish right of way by prescription, the right must be shown to be adverse to the owner of the soil: *Lawton v. Rivers*, 13 Am. Dec. 741; *Hill v. Crosby*, Id. 448.

MEEK v. ATKINSON.

[1 BAILLET'S LAW, 84.]

DURESS, CONTRACT WHEN AVOIDED ON GROUND OF.—It is only in cases where the arrest is made without sufficient cause, or lawful authority, or where an improper use has been made of it, and an advantage gained thereby, that a party can avoid his contract on the ground of duress.

STATUTE OF LIMITATIONS, SURRENDER OF POSSESSION OF PERSONAL PROPERTY ACQUIRED BY.—A party who, after acquiring title to personal property by the statute of limitations, surrenders the possession of it, upon a compromise with the original owner, can not afterwards set up title under the statute, although at the time of the surrender he expressed his determination to pursue his right.

TROVER for two slaves. The plaintiff and the defendant were sons-in-law of William Spraggins. The plaintiff proved a gift of the slaves to his wife, and possession of them by himself for fourteen or fifteen years. His surrender of them was made under the following circumstances: The plaintiff, who resided in Laurens, went to Abbeville to attend the sale of the Spraggins estate, and was there arrested on writs issued at the suit of the defendant for this slave, and for debts due him from the plaintiff. Only two persons were present, both of whom declined to become his bail; the officer agreed to wait until his friends should arrive from Laurens, and also offered to take him to that place; the parties then effected a compromise, by which it was agreed that the plaintiff should surrender the slaves, and pay the debts to the defendant, who agreed to withdraw the suits, and pay the costs. The plaintiff declared at the time that he would have the slaves back again at the risk of his life.

The agreement was duly performed on both sides, but the plaintiff shortly after brought this action. It also appeared in evidence at the trial that the plaintiff, at the time of his arrest, was on the eve of emigrating to Alabama, and had completed all his preparations for so doing, and that the debts upon which he was sued were justly due.

The judge charged the jury that there was no duress proven

sufficient to avoid the surrender of the slaves made by the plaintiff to the defendant, but the jury found for the plaintiff for the value of the slaves. The defendant moved to set aside the verdict, and for a new trial.

Bauskett and Dunlop, for the motion.

Moore, *contra*.

By Court, JOHNSON, J. The gift of Hannah to the defendant's wife, and of Charlotte to the plaintiff himself, by their father-in-law, William Spraggins, were clearly and satisfactorily proved, as was also the plaintiff's possession of Charlotte for fourteen or fifteen years before he delivered her up to the defendant. From these facts it follows that in respect to their several gifts, the property in Charlotte and her child, the slaves in dispute, was in the defendant, but that the plaintiff's long and undisputed possession was, under the statute of limitations, a bar to his right of recovery; and the only debatable ground is, whether the surrender and delivery of them, made by the plaintiff to the defendant, is a bar to his claim. The ground taken by his counsel is that it was made under circumstances amounting to duress, and, therefore, deprived him of no right. That a contract extorted by means of duress of the person, imposed no obligation on the party to be bound, and deprives him of no right, is a proposition which no one will be disposed to controvert; and it would seem, according to the cases of *Collins v. Westbury and Brown*, 2 Bay, 211, and *Sasportas v. Jennings and Woodrop*, 1 Id. 470, which have been much relied on on account of their supposed analogy to this case, that under peculiar circumstances of hardship, duress of goods will be a good ground to avoid a bond given for their release. But I apprehend that a contract is not necessarily void, because even the person of the party to be bound is under restraint. One who is lawfully imprisoned may enter into a contract to obtain his discharge, or he will, in general, be bound by any contract he may make; and so with respect to duress of his goods. Contracts made with respect to them are not necessarily void; for they may be based on a good and valuable consideration. And I take it that is only in those cases where the arrest is without sufficient cause, or lawful authority, or where an improper use has been made of it, and an advantage gained, that the party can avoid his contract; and this appears to have been the principle on which the cases above cited were decided.

The arrest in this case was made under lawful authority, in

pursuance of an apparently well-founded cause of action, and by an officer duly qualified; and the question is, whether the defendant used the occasion to extort an unjust and unconscionable contract from the plaintiff. The allegation on the part of the plaintiff is, that the defendant availed himself of the accidental circumstance of his going into an adjoining district to make the arrest at a place distant from that in which the plaintiff's friends resided, at a time when all his preparations had been made to remove to a distant country; and that he had no alternative but to surrender his property or to go to jail. These are, however, highly-drawn colorings of the facts. It is true that the arrest was made in an adjoining district, and out of the immediate neighborhood of the plaintiff's residence. It was not, however, without the reach of his acquaintance; but on the contrary, was at the house of his brother-in-law, at which his particular friends were expected to arrive in the course of a few hours. Every indulgence, too, which this state of things permitted, was afforded to him by the deputy sheriff who arrested him; and the circumstance that he had made arrangements to remove from the state without paying the defendant what he owed him, or delivering up the slaves which he claimed, rendered further delay on the part of the defendant a matter of hazard. A prudent man, if he had intended to assert his rights, would not have delayed much longer. So much for the circumstances; let us now examine the contract itself.

There is no complaint, so far as the contract went, to discharge the debts which plaintiff owed to defendant; they are admitted to have been justly due. It will be recollected that the slaves in dispute did belong to the defendant, and that he had only lost his remedy to recover them by too much delay, probably in respect to his father-in-law, William Spraggins, who had given them to the plaintiff. Was there anything unjust, unreasonable, or unconscionable in his seeking to recover them by due course of law? Could he know that the plaintiff would consent to avail himself of the lapse of time which some men would have regarded as unwarrantable? Or was the surrender made by the plaintiff, and the acceptance by the defendant, under these circumstances, such as to induce a belief that the latter acted from necessity, and that the former used the occasion to extort an unjust contract from him? I think not. Much reliance has been placed on the circumstance that the plaintiff avowed his determination to pursue his right

to the slaves, notwithstanding that he had consented to give them up to the defendant. But that of itself could not avail him any more than if he had sold them for a valuable consideration, and at the same time declared that the purchaser should not have them. It can, at most, only amount to a circumstance in aid of the proof of duress, and is, I think, fully balanced by the fact that he subsequently, and before he delivered the negro, avowed that the defendants having taken one of his children to bring up was a motive to the compromise. I am therefore of opinion that the motion for a new trial must prevail.

Motion granted.

As to what constitutes duress, see *Watkins v. Baird*, 4 Am. Dec. 170, and note, 172; *Collins v. Westbury*, 1 Id. 643, and note; *Edwards v. Handley*, 3 Id. 745.

TOMKINS v. TOMKINS.

[1 BAILEY'S LAW, 92.]

TESTATOR POSSESSED OF CAPACITY TO TRANSACT ORDINARY BUSINESS OF LIFE, may make a will, however inferior his capacity or weak his understanding, either from natural or adventitious causes.

THE REASONABLENESS OF A WILL is a circumstance in favor of the testator's capacity, where there is doubt as to such capacity.

ABILITY TO RECOLLECT MINUTELY INSTRUCTIONS GIVEN THE DAY BEFORE is wholly inconsistent with the imbecility and alienation of mind that incapacitate from making a will.

PROOF OF INSTRUCTIONS FOR, OR THE READING OF, THE WILL, is necessary where the capacity of the testator is in any degree of doubt.

APPEAL from the decree of the ordinary of Edgefield district, refusing probate of the will of Samuel Tomkins, deceased. The will, which was propounded by the executors, was duly executed, and attested by three subscribing witnesses; but the probate was resisted on the ground of the alleged incapacity of the testator, and his ignorance of the contents of the will. The issue, *devisavit vel non*, was submitted to a jury, who, concurring in opinion with the judge, found for the will. The next of kin moved to set aside the verdict and for a new trial.

Wardlaw and Bauskett, for the motion.

Thompson, contra.

By Court, JOHNSON, J. The exceptions taken to the instructions given to the jury by the presiding judge, which are made

the grounds of this motion, appear to have been founded, for the most part, on a misconception of what those instructions were, as they do not necessarily arise out of the report made to this court. I shall, therefore, without regard to the order in which they are stated in the brief, consider only those questions which arise out of the case as presented to us here. They are: 1. Whether Samuel Tomkins was, or was not, of sound disposing mind at the time of the execution of his supposed will; and, 2. Whether the paper propounded was, in point of fact, the will of Samuel Tomkins.

However inferior the capacity, or weak the understanding, whether it arise from natural or adventitious causes, if a man possess mind sufficient to transact the common business of life, there is no question but that he may make a will; and the only difficulty which cases of this kind present, is to ascertain the existence or absence of this state of the mind. The concurring opinion of the judge and the jury who tried this cause, would, even in a doubtful case, be regarded as decisive of the affirmative of the first proposition; and whether we regard the intrinsic evidence furnished by the provisions of the will itself, or the circumstances attending its execution, the same conclusion will result. The will provides for his widow to an extent which she herself, upon being consulted, thought adequate, or rather at which she expressed no dissatisfaction; and after having given specific legacies to several of his near relations, he gives the residue of his estate to his two illegitimate children, having no children by his marriage; and although I am too much a stranger to his connections and relations to pronounce that those provided for had the highest claims upon him, and that his will is precisely that which the wisest man would have made, yet, allowing for the caprice which even a wise man has a right to indulge in the disposition of his property, I have no hesitation in pronouncing that there is nothing in it eccentric or unreasonable. This in itself is not, it is true, conclusive of his sanity; but it is a circumstance entitled to weight in a doubtful question.

Of the same character are the circumstances attending the execution. James Tomkins, one of the executors, was sent for by the testator, and, on his own suggestion, to write his will; and after a private conference, professedly with a view to instructions, he prepared a will. This was done on Wednesday night. On Thursday night, after it was brought to him for execution, James Tomkins proposed to read it to him; but he requested that the reading might be dispensed with, and went

on to inquire particularly whether the will provided for every specific legacy which it is found to contain, naming the legatees and the particular property given, and closed the inquiry by asking whether the residue of the estate had been disposed of as directed; and on being answered in the affirmative, he signed the will. The testator is said to have been, when in health, a man of vigorous understanding; and although the proof is very abundant that his mind had been greatly impaired by disease, his minute recollection of instructions given for preparing his will twenty-four hours before, is wholly inconsistent with that imbecility and alienation of mind which, according to the rule, incapacitated him for making a will.

Opposed to this host of circumstances, there is nothing but the opinion of some of the witnesses, including, indeed, his attending physicians and nurse, but unaided by any one circumstance to show that, when his attention was aroused, or called to the subject of the will, his mind did not run in the same even and reasonable channel; and whatever weight these opinions might derive from the character and intelligence of the witnesses, they are, in my judgment, decidedly outweighed by the circumstances.

The second proposition embraces, first, a supposed departure from the instructions in relation to the devise to James Tomkins, who wrote the will, under the designation of "my land adjoining John Holsonbake;" and secondly, and principally, the entire absence of any act of the testator disposing of the residuary estate. The testator, it seems, owned a tract of land adjoining John Holsonbake, which he had purchased of a man of the name of Jacob Holsonbake, and which he distinguished by his name. He also owned two other small tracts in the same neighborhood; but the witnesses seem to differ as to the fact, whether these last do, or do not, in fact adjoin the lands of John Holsonbake. The instructions for writing the will, as deduced from the interrogatories put by the testator, at the time of the execution, to James Tomkins, who wrote it, were, that he should give to himself "the Holsonbake tract;" and the supposed departure from the instructions consists in the assumption that the devise covers also the other two tracts.

In a contest about the distribution of the estate under the provisions of the will, it might well become a question whether all, or only one of the tracts of land, were included in the devise; but in a question as to the admission of the will to probate, an acknowledged mistake as to one particular would not

necessarily destroy all the other provisions; and regarding it as an evidence of fraud and imposition, as it is intended to be used here, it would only amount to a circumstance, to count for what it was worth. But the fact of its being a departure is not made out; for although the devise differs in terms from what the supposed instructions were, yet, from anything that now appears, they are in substance the same. "The Holsonbake tract" lay adjoining John Holsonbake, and it does not appear whether the other two did, or did not; but if they did, I am not prepared to say that parol evidence would be admissible to identify the particular tract intended to be described by the terms used in the devise.

The second branch of this proposition involves a question of more novelty and interest. There is an entire absence of any proof at all of instructions from the testator as to the disposition of the residuum of his estate, which constituted a principal part of it. The proof furnished by those who contend for the establishment of the will is, that the testator neither read, nor heard it read; but that he contented himself with inquiring of James Tomkins, whether he had disposed of this part of his estate as he had directed, and signed it upon his answering in the affirmative. The question then is, whether these circumstances constitute sufficient evidence of his assent to it. I think not. A will is defined to be the declaration of a man's mind, as to the manner in which he would have his estate disposed of after his death. The usual and almost the only mode in which assent to a writing is manifested, is by subscribing it; and, in the absence of any other proof, that would be sufficient evidence of assent to a will, as well as to any written contract. This constitutes, indeed, the highest evidence; but it is not conclusive. According to the definition, a will ought to express the mind of the testator; and that can not be his mind, or will, of which he is ignorant. The case of *Billinghurst v. Vickers*, 1 Phillim. 187, furnishes some of the rules by which we are to be governed in the inquiry as to the assent of the testator. In that case, Sir John Nicholl lays it down as a principle well established, that where capacity is in any degree doubtful at the time of the execution, there must be proof of instructions, or reading over; and that the presumption is strong against an act done by the agency of the party to be benefited; and although the court will not presume fraud, it will require strong proof of intention.

The evidence in the case under consideration is very abundant, that the mental faculties of the testator were much im-

paired; and of consequence, impositions might have been practiced upon him with more facility than when in its full strength and vigor; and although the interest which James Tomkins took, as guardian of the illegitimate children, was, perhaps, inconsiderable, he falls within the suspicions on which the rule is founded. According to the rule, he was bound to furnish proof of intention, and here was not only the absence of proof of intention, but direct proof, that the testator died without knowing the contents of the residuary clause of his will, except so far as might be inferred from the declarations of James Tomkins that they were according to his instructions; and this, so far from constituting proof of his own will, proves only that James Tomkins declared it to be such.

The whole of the residuum is given to his illegitimate children, and this circumstance, it has been insisted, constituted a very powerful motive for the testator's not wishing it to be promulgated; nor, indeed, could James Tomkins have any adequate motive for inserting such a provision, inconsistently with the will of the testator. The counsel, too, have conceded to him a character wholly above suspicion, and the whole case taken together looks so like what ought reasonably to be expected, that if I possessed any discretion over the rule, I should incline to bend it to the occasion. But the signature of the testator is not conclusive of his assent to the will, and the proof is, that in this respect he was ignorant of the contents. It could not, therefore, be his will; and the motion for a new trial must, therefore, prevail.

It will readily be perceived, that a question may arise in the further progress of this case, whether, although the will may be void in respect to the residuary clause, it will not stand as to the others. It would seem, according to some of the English cases, that it would; but this question was rather hinted at than discussed in the course of the argument, and it is thought better to leave it open, that it may be further investigated, if it should become necessary to the ultimate disposition of the cause.

Motion granted.

ROSS v. SUTTON.

[1 BAILEY'S LAW, 126.]

ADMINISTRATOR DE BONIS NON CAN NOT MAINTAIN AN ACTION for the price of goods of the intestate sold by the first administrator.

PRIVITY.—There is no privity of contract between the debtor of the first administrator and the administrator *de bonis non*.

ASSUMPT to recover the price of certain goods purchased by the defendant at a sale of the intestate's effects which had been made by James J. Sutton, who preceded the plaintiff as administrator of Jonathan Sutton. After the sale and before the goods were paid for, Sutton's letters were revoked and administration *de bonis non* committed to the plaintiff who brought this action. The judge denied a motion for a nonsuit, and the jury found for the plaintiff. The defendant renewed his motion for a nonsuit in this court, and also moved for a new trial.

Williams, for the motion, cited *Seabrook v. Williams*, 3 McCord, 371.

Clendinen, contra.

By Court, Norr, J. An administrator is the representative of the intestate, for the purpose of administering the goods and effects which belonged to the deceased in his life-time; and the personal estate, in contemplation of law, belongs to him. An administrator *de bonis non* is entitled only to the goods left unadministered by the first administrator. A sale by an administrator is an administration of the estate *pro tanto*: the property is changed, and no longer belongs to the estate of the deceased. A promise to pay to an administrator, is a promise to him in his individual capacity, in which he need not entitle himself administrator; and there is no priority, therefore, between the debtor of the first administrator and the administrator *de bonis non*. There can be no doubt but that the first administrator may sue the defendant, as on a promise made to himself. He is also answerable to the administrator *de bonis non* for all the goods which he may have received of the estate. The proceedings in this case are not before us, and therefore we do not know what form of declaration has been adopted. But the plaintiff must have declared either on a promise to himself, or on a promise to his intestate, neither of which was supported by the evidence. The motion for a nonsuit ought, therefore, to have been granted.

Motion granted.

CHOICE v. MOSELEY.

[1 BAILEY'S LAW, 136.]

CONTRACT IN ALTERNATIVE—RIGHT TO ELECT.—When a party to a contract agrees to do one of two things by a given day, he has, until the day is past, the right to elect which of them he will perform; but if he allows the day to elapse without performing either, his right of election is lost.

Sure on a written contract, in the following words: "On or before the twenty-fifth of December, 1827, I promise to pay, or cause to be paid, unto Daniel Hull, or holder, fifty dollars, to be discharged in a horse, for value received of him this fourteenth August, 1826." This contract was signed by the defendant, and delivered to Hull, who subsequently transferred it to the plaintiff. The defendant, on the day after that specified for payment of the money or delivery of a horse, went in search of Hull to tender a horse, but Hull having removed, he was unable to make the tender. On learning that the contract had been transferred to the plaintiff, the defendant tendered to him a horse, which the plaintiff refused to accept, on the ground that he had the right to elect, and he preferred the money. The judge held that, as to Hull, the right of election was in the defendant, and the plaintiff had no higher right than his assignor; that the tender of a horse to the plaintiff was a performance of the contract, and discharged his right of action. A nonsuit was ordered, which the plaintiff now moved to set aside.

Earle, for the motion.

Thompson, contra.

By Court, JOHNSON, J. The question whether the note on which this action was brought was or was not transferable by delivery, so as to enable the plaintiff to maintain an action on it in his own name, does not appear to have been made in the court below, and can not, therefore, be considered here; and I concur with the presiding judge in the opinion that the plaintiff stood in no better situation, with respect to his power to accept or refuse the horse, when tendered, than the original payee would if the note had not been transferred; but the tender had been made to himself, and the action brought in his name, so that the only question is, whether the plaintiff was or was not bound to accept the horse when tendered.

I take it that the rule is very clear, that when one contracts in the alternative to do one of two things by a given day, he has, until the day is past, the right to elect which of them he will perform; but if he suffer the day to elapse without performing either, his contract is broken, and his right of election is lost. The present case sufficiently illustrates the reason of the rule. The payee of the note might reasonably calculate upon the value of a horse at a particular day. He might want him at that time for a particular purpose. But if it were left to the defendant,

at his election, to deliver a horse at any indefinite period afterwards, he might select that time at which the value of horses would be most depreciated, and thus gain an advantage inconsistent with his contract. The note in question was due on the twenty-fifth of December, 1827, and this action was brought in October, 1828. The tender is said to have been made shortly before, so that at least eight months had elapsed before the tender was made. The plaintiff was not bound to accept, and a new trial must, therefore, be granted.

Motion granted.

HAWES v. DUNTON.

[1 BAILLET'S LAW, 146.]

LIABILITY OF MERCANTILE PARTNERSHIP ON NOTE MADE IN FIRM NAME.—

A mercantile partnership is liable on a promissory note signed by one of its members, in the firm name, without the knowledge or consent of his copartners; although the note was given for the debt of a third person unconnected with the copartnership business.

ACTION on a joint and several note of McClendon and the defendants, payable to Kilgore, or bearer, and by him transferred to the plaintiff before it became due. The defendants were copartners, and the copartnership was limited to buying and selling. It was admitted that the note was signed by Dunton without the knowledge or consent of his copartner, and that it was given in payment of McClendon's individual debt, which was unconnected with the business of the copartnership. The judge decreed for the plaintiff, and the defendant moved to reverse the decree.

Butler, for the motion, cited *Foot v. Sabin*, 19 Johns. 154 [10 Am. Dec. 208].

By Court, JOHNSON, J. In all the variety of the pursuits of men, there is none in which I believe they may not associate and form partnerships; and with respect to themselves, they have a right to stipulate for any event or casualty that may arise. But in relation to the rest of the world, the nature and object of the association must determine how far they are capable of binding each other. If the partnership is limited and special in its object, of course one can not obtain a credit on the faith of the firm, in relation to a matter foreign to that object; but if the objects of the association are general, the power to bind is equally so. In short, the power to bind is in exact

proportion to the extent, and nature, and object of the association. If two men were to associate together, and agree that they would jointly perform all work that might be confided to them, and that they would divide the proceeds equally, no person would trust one of them, on the credit of the other, for a valuable estate, or for an extensive stock of merchandise, for the obvious reason that these things are inconsistent with the object of the partnership. But if, on the other hand, they should unite all their wealth and their personal credit, and agree to share the profits and losses of planting, speculation, and trade, and of mechanical and professional pursuits, each would, for the same reason, be competent to bind the other, to the extent that the exigencies of all these various pursuits and avocations might require.

Bills of exchange and promissory notes are said to be the creatures of commerce; and it is in a good degree by their agency that commerce is sustained and kept alive. It would shake the commercial world to its center, if they were now told that one partner in trade was not capable of binding his firm by a promissory note. Credit is the wealth of the merchant; these instruments are those in common use amongst them as the evidence of debt, and as the medium of exchange and re-exchange; and without them they would find it difficult to manage their affairs. The case of *Foot v. Sabin* [10 Am. Dec. 208] does not apply. There the note specified on its face that the firm was a "surety." Here nothing is stated in the note of the nature of the consideration. On its face it is a commercial security for the payment of money, entered into by merchants, and the plaintiff, as the holder, is entitled to recover.

Decree affirmed.

ADAIR v. McDANIEL.

[1 BAILEY'S LAW, 158.]

RIGHTS OF SENIOR EXECUTION CREDITORS—INDEMNITY TO SHERIFF.—The rights of a senior execution creditor will not be postponed to those of a junior execution creditor, because the latter gave an indemnity to the sheriff, which the former refused to give; a plaintiff in execution is not bound to give indemnity to the sheriff, although the defendant's title to the goods levied on is contested by third persons.

RULE upon the sheriff to show cause why the proceeds of certain slaves sold as the property of the defendant should not be paid over to the plaintiff's execution. The defendant, Corn-

well, who was liable as surety to McDaniel, his co-defendant, required the sheriff to levy on the slaves as the property of McDaniel, but as they were claimed by Mrs. McDaniel, he refused to make the levy unless he were indemnified. Cornwell then gave written notice to the plaintiffs in the senior executions against McDaniel, that if they did not indemnify, he would, but in that event should claim that the proceeds be applied to the satisfaction of Adair's execution in discharge of his own liability. The senior creditors declined to interfere, and Cornwell indemnified the sheriff, who then sold the slaves under Adair's execution. The plaintiffs in the senior execution also claimed the proceeds of the sale, and the sheriff refused to apply them to the satisfaction of Adair's execution; upon which this rule was granted upon Cornwell's application. The judge discharged the rule, and a motion was now made to reverse his decision, and to make the rule absolute.

Williams, for the motion.

By Court, JOHNSON, J. It is conceded that if the levy and sale had been made in the ordinary way, the senior executions would have been entitled to the money; and I can discover nothing in the circumstances under which this levy was made, which would lead to a different result. The lodgment of the executions created a lien on the whole of McDaniel's personal property; and I apprehend that this lien could only be discharged by the parties interested. Now the plaintiffs in these executions have done nothing, that I can perceive, to discharge their several liens. It is true, they refused to indemnify the sheriff; but in this they were merely passive; and the law did not hold them bound to activity. Upon lodging the executions their agency ceased; and it became the duty of the sheriff to make the money according to the exigency of the writs. It was not incumbent on the plaintiffs to point out the time, place, or extent of the levy, or to indemnify the sheriff against his liability, if he levied on the goods of another. All this was the concern of the sheriff alone. But I am at a loss to discover what merit the claim set up for Cornwell can derive from the circumstance that he did undertake to indemnify the sheriff. If the property belonged to McDaniel, no indemnity was necessary; if it did not, then neither the plaintiff nor Cornwell could be entitled to any benefit from it; and I can not conceive why the senior creditors should be prejudiced by a proceeding which was either nugatory or worse; being likely to work an injury to a third person,

the real owner of the property, if it did not belong to the defendant. The principle contended for would lead to mischievous results in practice. It would follow, as a conclusion from it, that a sheriff is not bound to levy on, or sell any property, the title of which is called in question, unless he is indemnified. Now let us suppose that the creditor entitled to precedence is absent, or unable from poverty (and the case might well happen) to give the indemnity required; then, if a mere show, or pretense of title in a third person, is got up for the occasion, the creditor whose priority is unquestioned, may be postponed by the contrivance of junior creditors.

But it may be asked whether a sheriff is bound, on his own responsibility, in all cases to levy on property in the possession of the defendant, although it is claimed by third persons. The sheriff is not bound to levy on property which does not belong to the defendant; nor would his being indemnified by the plaintiff impose such an obligation upon him. The responsibility of deciding the question of property is a delicate one, and if there exists a well-grounded apprehension that the title is not in the defendant, I think he ought not to be made liable for refusing to levy. The plaintiff might get at the property by filing a bill against the person claiming it, to compel him to litigate his rights. This mode of proceeding does not, I confess, comport with that promptness which ought to characterize proceedings on final process; but it belongs to the legislature, and not to the courts, to provide one of a more summary character. That in use in England, which authorizes the sheriff to summon a jury for the trial of the question, would, it seems to me, be admissible here. As the verdict only operates as an indemnity to the sheriff, without concluding the title of the parties, the practice is altogether unobjectionable, and it is a matter of surprise that the same, or a similar remedy, has not yet been provided for an evil which all who have had much concern with the courts, must have seen and felt.

I am aware that the American books of reports, particularly those of New York, are full of cases, in which it has been held, that a prior execution loses the lien created by the entry in the sheriff's office, if the plaintiff has delayed proceeding on it an unreasonable length of time; and even after levy, if the property has been left in the possession of the defendant, subsequent purchasers and junior executions have been preferred. *Bliss v. Ball*, 9 Johns. 132; *Storm v. Woods*, 11 Id. 110; *Farrington v.*

Sinclair, 15 Id. 428; *Kelly v. Griffin*, 17 Id. 274.¹ And I have some recollection of having seen a case, in which a prior execution was postponed because the plaintiff refused, after notice, to indemnify the sheriff, and a junior creditor preferred because he gave an indemnity. I am not able to lay my hands upon this case; but it is in perfect conformity with the principle of the other cases cited, namely, that the senior creditor loses his lien by inactivity. But the universally received opinion and practice in this state, and the whole current of our decisions, are opposed to that principle. The favor with which dormant executions are regarded by our courts, is perhaps peculiar to this state. It originated in the fact, that the revolutionary war left the citizens of this state almost universally involved in debt, to an extent which would have exhausted their estates, if payment had then been enforced. And the good feelings growing out of the recollection of mutual sufferings, suggested the expedient of obtaining judgments, and lodging executions as securities, which were not to be enforced until necessity required it. The effect of this arrangement was in a high degree beneficial to the industry and prosperity of the country; and hence our uniform practice on the subject. I venture to assert, that no case can be found in our books of reports, nor do I recollect to ever have seen or heard of one, in which a junior judgment was preferred to an older in relation to land, or a junior to a senior execution, in relation to personal estate, except in cases of actual fraud.

In *Snipes v. Sheriff of Charleston*, 1 Bay, 295, it was held that a *fi. fa.* did not lose its binding efficacy, although no proceeding had been had on it for a year and a day; and money made under a junior execution against the same defendant was ordered to be paid over to the senior lien. So in *Greenwood v. Naylor*, 1 McC. 414, a plaintiff who had lodged a *fi. fa.* in the sheriff's office, with a memorandum indorsed, "lodged to bind." was held to be entitled to money made by a sale of the defendant's property under a junior execution.

The same rule has prevailed in the court of equity. In *Brown v. Gilliland*, 3 Dessau. 539, a sale of certain slaves was set aside, on the ground that they were bound by an execution in the office against the vendor, although it had been returned *nulla bona* nearly two years before the sale was made. The motion to reverse the decision of the presiding judge in this case must therefore be refused.

1. *Kellogg v. Griffin*, 17 Johns. 274.

LOSS OF PRIORITY BY REFUSING TO INDEMNIFY OFFICER.—Judge Johnson, in delivering the foregoing opinion, seems to concede that the opinion and practice in South Carolina regarding the effect of a refusal to indemnify an officer is not in harmony with the law upon the same subject as understood and administered in other states. "Where an officer entitled to indemnity and holding property under two or more writs, calls upon the plaintiffs therein for indemnity, some of whom comply and others refuse, only those who comply can share in the proceeds of the sale. This is because the officer has theright to release the levies of the writs whose owners are unwilling to share the responsibility of the seizure." Freeman on Executions, sec. 275, citing *Burnett v. Handley*, 8 Ala. 685; *Pickard v. Peters*, 3 Id. 493; *Smith v. Osgood*, 46 N. H. 178; *Davidson v. Dallas*, 8 Cal. 227.

CARNOCHAN v. GOULD.

[1 BAILEY'S LAW, 179.]

IMPLIED WARRANTY.—The principle of implied warranties is directed only against those secret defects against which the most skillful can not always guard; and where the seller was not guilty of any fraud, deceit, misrepresentation or concealment, and the buyer had opportunity, by the exercise of ordinary diligence, to acquire a knowledge of any fact necessary to enable him to form a correct estimate of the value of the thing he is about to purchase, the law will not raise an implied warranty that the thing should answer the purpose for which it was bought.

FACTOR CAN NOT BIND HIS PRINCIPAL BY SUBMITTING TO ARBITRATION a claim for damages arising out of an alleged breach of an implied warranty of the quality of the thing sold.

ASSUMPSIT. The opinion states the case. The jury, under the charge of the judge, found for the defendant, and the plaintiff moved to set aside their verdict.

Desaussure, for the motion.

King, contra.

By Court, JOHNSON, J. The grounds of this motion consist of two classes. The first of them denies the right of the plaintiff to maintain the action, admitting the defendant's liability. The second admits the plaintiff's right to sue, and rests the defense on the merits of the cause. The court being with the defendant on the second, the first becomes wholly unimportant; and I shall proceed to consider the case without reference to that class of objections further than to remark that this disposition of it is not to be regarded as a sanction, by the court, of the principles on which the plaintiff's right to sue is founded; in other words, that it is intended to leave that question open.

The case, divested of this difficulty, turns on the following state of facts: In May, 1820, the defendant, a cotton planter of St. Simons, consigned to the plaintiff, his factor, eight bales of sea-island cotton, to be sold in the Charleston market; and William Stewart, a merchant residing there, after having examined the cotton in the usual mode by cutting the bags, and taking out samples, purchased it at a price agreed upon. Stewart shipped it to Liverpool. His consignee caused a survey of it to be made there by two persons skilled in the article; and upon examination it was found, that although of fine quality, it was inseparably intermixed with hair one or two inches in length, in the proportion of a pound or a handful to each bale, or of one or two hundred hairs to each handful of cotton; that this intermixture of the hair with the cotton extended through the whole bulk, in all the bales, and was as visible in that immediately within the canvas from whence the samples were taken as in the center of the bale. From these circumstances, the surveyors concluded that the cotton was unmerchantable, and unfit for the purposes for which such cotton was generally used, and recommended a sale at public auction, which was accordingly made, at a loss of sixty-five pounds nineteen shillings and eight pence to Stewart, the purchaser and shipper. For this sum Stewart made a demand upon the plaintiff, who agreed to submit the matter to the decision of two respectable merchants; and they having awarded against him, he paid the money to Stewart, and brought this action to recover it from the defendant.

From these circumstances the following seems to be the necessary conclusion: 1. That in consequence of the intermixture with the hair, and the impracticability of separating it, the cotton could not be wrought up into the fine fabrics usually manufactured of sea-island cotton, but still remained valuable as a substitute for coarser cotton; 2. That the defendant was not guilty of a fraud in packing the cotton; the quantity of hair being too inconsiderable to have operated as a motive, and the circumstance, which was in evidence, that untanned hides were used as bands for the machine in which it was ginned, sufficiently proved that it was accidental; and 3. That Stewart might, with ordinary diligence and circumspection, have detected the intermixture of the hair in his examination of the samples; if, in fact, he did not actually do so. And the question now is, whether, under these circumstances, the defendant is liable to refund the amount of loss on the sales at Liverpool. There is no pretense that there was any express warranty on the part of

the defendant, either that the cotton was sea-island, or that it would answer the purpose for which that article was commonly used, nor that it was unmixed with any ingredient which would detract from its value; and his liability therefore, if he be liable, must arise out of the doctrine of implied warranty as established in our courts of justice, and as a deduction from the fact that the price of sea-island cotton was paid for it. I take it that the universal rule upon the subject is, that when there is no fraud in the seller, neither *suppressio veri* nor *suggestio falsi*, and the purchaser is possessed of all the information necessary to enable him to make a correct estimate of the value of the thing he is about to purchase, or which from its nature would occur to an ordinary observer, the law will not raise an implied warranty on the part of the seller, that it shall answer the purpose for which the purchaser bought it, or that he shall be liable for the loss that he may sustain by a resale. A contrary conclusion would be inconsistent with the nature of a warranty.

A buyer does not ask of the seller to warrant things that are palpable to the senses; as that a mirror will reflect a body placed before it, that a bell will emit a sound when struck by a hammer, or that vinegar is sour. Neither will the law raise such an undertaking by implication. It is only against those secret defects against which the most skillful can not always guard, that the principle of implied warranties is directed. This rule is of universal application, but if a distinction can be made, I hazard little in asserting that it applies to the case under consideration and others of the same class, with even more force than any other. I pay no compliment to that enterprising and intelligent class of men, the dealers in cotton, when I remark that from personal observation I am persuaded they are better judges of the quality and value of cotton, and will sooner detect its imperfections and its intermixture with foreign materials than even the grower himself, when they have equal opportunities. The grower has no other standard of quality than his own or his neighbor's crop. He judges of the fitness of the condition for market by the same standard. On the contrary, the dealer in the common market has constantly before his eyes all the varieties from the finest sea island to the most worthless trash of the uplands, and is enabled to form in his mind a standard by which he readily classes all the parcels presented to him. It is unreasonable, then, that in the event of a loss he should shelter himself under a pretended ignorance of the quality which he purchased.

Again, it is well known that the varieties in the quality of this article are very numerous. Neighboring, and even the same plantations, cultivated in the same manner, produce qualities widely different. It is well known also that they are manufactured into goods suited to all the varieties of staple and quality; and the accountability of the planter would be endless, if he should be rendered responsible for their adaptation to the use for which the purchaser designed them, or for which, in his judgment, they were suitable. The case of *Vanderhorst v. McTaggart*, 2 Bay, 498, proceeded on this principle. There the defendant examined only two out of fifteen barrels of rice, the article sold, and notwithstanding that on their examination at Alexandria, in Virginia, they were found to be all damaged and unmerchantable, the purchaser was held to be bound; and the court lay down the rule that if the purchaser neglect to examine the article when he might have done so, it will be regarded as a tacit admission of its merchantable quality. So, in the case of *Rose & Rogers v. Beattie*, 2 N. & M. 538. There, it is true, the purchaser had a verdict on the ground that the seller had committed a secret fraud in packing the cotton sold; but it is laid down as a settled rule that if one purchase an article capable of inspection, as rice, cotton, etc., he will be considered as having purchased on his own judgment, and will be bound by it, if the whole bulk correspond with the sample.

The application of these principles to the case before us admits of no difficulty. The defendant was not guilty of any fraud, deceit, misrepresentation, or concealment. Stewart purchased the cotton after a fair examination of samples corresponding with the entire bulk, and at a price fixed by himself. He either was or might, with ordinary diligence, have possessed himself of any fact necessary to enable him to form a correct estimate of its value, and whether we refer the matter to principle or authority, he is equally bound by his contract. It is not pretended that the defendant was bound by the submission and award made under the agreement between the plaintiff and Stewart, and whatever other powers the plaintiff might have possessed as the agent or factor of the defendant, he had no authority to compromise his rights in this way. It is placing his claim on the highest possible ground to subrogate him to the rights of Stewart. He is not, therefore, entitled to recover.

The case of *Barnard v. Yates*, 1 N. & M. 142, is relied upon as having broken in upon the rule before laid down; but al-

though some of the dicta in that case take a very wide range, it will be seen upon a careful examination that the judgment of the court proceeds on the ground that the owner was guilty of a fraud which he practiced so successfully as to impose, not only on the buyer and the agent who sold for him, but on the best judges of the article, and made one thing so nearly resemble another, that the imposition could only be detected by the actual use, so that the case falls within the principle I have before laid down.

Motion refused.

IMPLIED WARRANTY, WHAT CONSTITUTES: *Emerson v. Brigham*, 6 Am. Dec. 109, and note 113; *Bradford v. Manly*, 7 Id. 122, and note 125; *Bailey v. Nichols*, 1 Id. 83, and note 84.

FOSTER v. BROWN.

[1 BAILEY'S LAW, 221.]

ALL ACTS OF ADMINISTRATOR DONE IN DUE COURSE OF ADMINISTRATION are valid and binding upon the estate, though his letters be afterwards revoked, and though the administration had been obtained by fraudulently suppressing a will.

TROVER CAN NOT BE MAINTAINED AGAINST SUCH ADMINISTRATOR, by the executor, for goods of the testator to which the administrator had regularly acquired title during the continuance of his administration; the proper course, in such a case, is to compel the administrator to account.

TROVER for a slave originally the property of the plaintiff's testator. Soon after the death of the testator, George and Pleasant Foster and the plaintiff, all sons of the testator, appeared before the ordinary and stated to him that their father had left a will which they had shown to a gentleman of the bar, who told them it was of "no account;" whereupon they had destroyed it. The ordinary, after citation regularly issued, granted administration to George and Pleasant Foster. The plaintiff became one of the sureties on their bond. A sale was had under the order of the ordinary duly made, and the persons interested in the estate became the purchasers; George Foster, one of the administrators, becoming the purchaser of the slave in question at a full and fair price. A few months afterwards the slave was in the possession of the defendant, who was a son-in-law of George Foster; but how he came into his possession did not appear. In 1825 the testator's will was admitted to probate, and the administration of George and Pleasant Foster

revoked. The plaintiff was one of the purchasers at the administrator's sale above mentioned, and it was clearly proved that when he appeared before the ordinary with George and Pleasant Foster and corroborated their statement that the will had been destroyed, he had the will in his pocket. The defendant produced a bill of sale from George Foster, dated subsequently to the revocation of the administration, but there was no evidence that he had paid the consideration named in the deed, nor that George Foster had accounted for the value of the slave. The judge charged that as the bill of sale was dated after the revocation of the administration it could not avail him; and that his title, having been acquired by fraud, was void. The jury found for the plaintiff, and the defendant moved to set aside the verdict, and for a new trial.

Williams and Dawkins, for the motion, contended that although administration be revoked, yet all lawful acts of the administrator, before the revocation, were binding on the estate: *Benson v. Rice*, 2 Nott & McC. 577. That the administration was fraudulently obtained can not alter the rule. That would be ground for revoking the administration, but such revocation belongs exclusively to the jurisdiction of the ordinary; as long as administration is unrepealed it can not be impeached in any other court: *Allen v. Dundas*, 3 T. R. 123; *Rex v. Vincent*, 1 Str. 481; *Rex v. Rhodes*, Id. 703. The sale was valid, and vested an individual title in George Foster, which could not be divested by the revocation of the administration. The present defendant has no concern with the question whether or not Foster accounted for the value of the slave, and this court has no jurisdiction of such question.

Thompson, contra, contended that the defendant had not shown that his case possessed any merits; that there was no evidence that he had paid anything for the slave, and that the whole title was a sham. That Foster's title was unavailing, unless he showed that he had paid or applied the price bid by him at the sale.

By Court, JOHNSON, J. The facts in evidence establish very clearly that the administration of the testator's estate, granted to George Foster and Pleasant Foster, was obtained by a fraudulent suppression of his will, and that the plaintiff himself was a party to the fraud; and if the rights of the parties were to be determined in reference to that state of facts alone, I am unable to perceive why the maxim, that when the parties are *in pari*

delicto melior est conditio defendentis, should not apply. The argument opposed to it is, that in his participation in the fraud, he acted in his own right, and that in the character in which he now sues, he represents the interests of others, who ought not to be prejudiced by it. If the application of the maxim could, by any possibility, work a prejudice to third persons, the argument would be conclusive; but I think it demonstrable here that, so far from it, the security of the persons interested in the estate is increased by it. If the plaintiff recovers in this action, that fund passes into his hands, and the legatees under the will have no other security than the personal responsibility of the plaintiff himself. But in the condition in which the parties now stand, there is no question that, if the legatees are entitled to recover the negro from the defendant, they have, in addition to his own responsibility, whatever security the administration bond of George Foster and Pleasant Foster will afford. The plaintiff himself, as *particeps criminis* in suppressing the will and procuring the administration, would be also responsible; for all who participate in a fraud are equally liable to the party injured by it; and a bill in equity, at the suit of the legatees against all the parties to the transaction, is clearly indicated by the circumstances as the most suitable, if not the only mode in which relief can be obtained.

There is, however, another, and, perhaps, more solid objection to the plaintiff's right to recover in this action. Granting all that may be necessary to charge the defendant, he can not be placed in a worse situation than George Foster himself would have been if he had remained in possession of the slave, and this suit had been brought against him; and yet, this action can not be maintained. It is true that, on the revocation of an administration, for whatever cause, he to whom the subsequent administration is granted may maintain trover against the first administrator for goods of the deceased which he has converted to his own use. But it is equally clear that all acts done in the due and legal course of administration are valid and binding on all interested, although it be afterwards revoked: *Benson v. Rice and Byers*, 2 N. & M. 577. Nor can the manner of obtaining the administration, whether fairly or fraudulently, vary the question. Suppose it fraudulently obtained, yet if the administrator pays the debts of the estate, or does any other act which a rightful administrator would be bound in law to do, thus far, at least, it would be fair, and for the most obvious reasons would be binding. It is obvious, then, that in this suit, even regard-

ing George Foster as the defendant, a leading inquiry would be, whether he had not legally administered this part of the estate; and the case presents the novelty of an action of trover brought to call an administrator to account. It is said that the *onus* of showing he had legally administered this part of the estate devolved on him. But supposing that to be true, a court of law is incompetent to settle the account; and it is upon this principle that the courts of law refuse to entertain a suit, even on an administration bond, until the accounts have been settled and the amount ascertained by a competent jurisdiction.

This reasoning applies with still greater force in regard to the defendant to this suit. George Foster has not, it seems, accounted for his administration; but the defendant, having no interest in the estate, could not, by any possibility, compel him to account; and to require of him to furnish proof of the administration is to demand an impossibility. Not so with the plaintiff. Having succeeded George Foster in the administration, he might have compelled him to account; and if the proof were necessary, it must of necessity have come from him, for no one else could supply it.

Motion granted.

GUPHILL v. ISBELL.

[1 BAILLET'S LAW, 230.]

TRUSTEE MAY MAINTAIN TROVER AGAINST HIS CESTUI QUE TRUST for a conversion of the trust property.

COURT OF EQUITY ALONE CAN COMPEL TRUSTEE to execute or surrender his trust.

RESULTING TRUST.—Where one person purchases a chattel with the funds, and for the use, of another, but takes the bill of sale in his own name, a resulting trust arises in favor of the owner of the fund, and he may elect to take the chattel or the fund; but the purchaser holds the legal title to the chattel.

EVIDENCE ESTABLISHING EXISTENCE OF TRUST, does not justify a presumption that the trust has been surrendered; nor does delivery of the property to one not authorized to discharge the trustee, amount to a surrender of the trust.

STATUTE OF LIMITATIONS PROTECTS THE POSSESSION of a party claiming under the trustee, and adverse to the *cestui que trust*, after the surrender of the trust.

TROVER for a slave and her children. The opinion states the case. The jury found for the defendant, and the plaintiff moved to set aside the verdict, and for a new trial.

Gregg, for the motion.

Clarke, contra.

By Court, JOHNSON, J. It is conceded that the slave Betty was originally the property of Jacob Bollinger; and the plaintiff gave in evidence a bill of sale from him to her late husband, William Guphill, dated the first of January, 1811. She was then a girl, and the children are her subsequent increase. Some time afterwards, Betty went into the possession of Mrs. Snyder, now Mrs. Foster, who was the mother of the defendant's wife, a widow, and niece of William Guphill. She retained possession of them until about the year 1819, when the possession was restored to William Guphill, who retained them until his death in November, 1821. By his will he bequeathed them to the plaintiff, whom he made executrix; and she kept them in possession until December, 1825, a period of more than four years, when the defendant got them into his possession. There is no controversy about any of the facts above stated, and standing alone they establish an unquestionable title in the plaintiff: 1. By a regular deduction of title; and, 2. By a possession in her for more than four years; so that the matters in controversy must be resolved by the merits of the defense, which I will now proceed to notice.

The defendant claims these slaves in right of his wife. It was in evidence that George Slappy administered on the estate of George Snyder, the father of the defendant's wife, and that William Guphill, the plaintiff's late husband, took upon himself, as the friend of the widow and children, to call upon him for a settlement of the estate, and that about the time he purchased Betty, he received from him on that account a sum of money the amount of which is not ascertained. Several witnesses testified to the declarations of William Guphill that he had purchased Betty with the money he received from George Slappy, for and on account of defendant's wife, who was then an infant, and that she belonged to her. Declarations of the same import were proved to have been made by the plaintiff herself subsequently to the death of her husband.

The receipt of the money from Slappy by William Guphill, and the investment of it in the negro Betty, for and on account of the defendant's wife, are facts earnestly controverted by the plaintiff, and about which doubts may well be entertained. The jury having, however, found them for the defendant, the court, according to a well-settled rule, are bound to regard them as sufficiently ascertained; so that the question now to be considered is, whether the defendant, having obtained a tortious

possession of the slaves, is entitled to retain them in opposition to the claims of the plaintiff. In the brief summary which I have before given of the evidence on the part of the defendant, I have, for the purpose of avoiding details, aimed to give conclusions of fact most favorable to him, and that upon which the verdict was evidently founded. These conclusions take for granted that William Guphill, under whom the plaintiff derives her title, possessed himself of funds which belonged to the defendant's wife, when she was an infant, and laid them out in the purchase of Betty for her use, but took the title to himself.

Now, there can be no diversity of opinion as to the nature of the interest which, under these circumstances, the defendant's wife had in the negroes; and the rights of William Guphill and his liabilities are as well ascertained. The infancy of defendant's wife precluded the possibility of her assent to this disposition of her funds; but upon her attaining full age, she, and on her marriage her husband for her, had the right to elect whether she would accept the substitute, or require an account and payment of the original fund. William Guphill had incurred the responsibility consequent on this right of election. In the event of the death of the slave, the defendant had a right to require the payment of the money. Until, therefore, the election was made, he, and those claiming under him, had the right of possession. In other words, the law raised an implied trust, that he would hold the slave to the use of the defendant's wife, subject to that right of election. He stood in the legal relation of trustee to her, and she of *cestui que trust* to him. There is no proof, as I shall have occasion to notice more particularly hereafter, of any election on the part of the defendant, except what arises from the fact of a tortious taking, or of the surrender, or execution of the trust on the part of William Guphill, or the plaintiff, his executrix; and this branch of the case resolves itself into the question, whether a trustee may maintain trover against the *cestui que trust* for a conversion of the trust property.

The rule is very clear that a trustee, or any one else entitled to the possession of property, may maintain trover for it. That a trustee has the right of possession even against his *cestui que trust*, until he has executed or surrendered it, is equally obvious. He is entitled to a lien on the trust property for all the expenditures incident to the execution of the trust, nor will even a court of equity divest him of the possession without providing an indemnity. Of his accounts, as trustee, equity alone takes cognizance, and although it might be competent to him to establish

them by evidence admissible in a court of law, that court is incompetent to administer adequate relief. Let it be supposed that the plaintiff here had proved on the trial of this cause, that William Guphill had expended in the execution of the supposed trust a sum equal in amount to the full value of the four slaves, it would have profited her nothing in the result. If the defendant were entitled to the possession, the court had not the power to reinstate the plaintiff. If she had brought her assumpsit at law, she would have stood in the relation of a general creditor, without the benefit of a specific lien, and above all, she would have been driven in a court of law to a course of proceeding and a mode of proof wholly different in the manner and result from the situation she would have been in as defendant to a bill in equity for an account and surrender of the trust. It follows, then, clearly, that a trustee can not be divested of the right of possession of the trust property but with his own consent, or by a decree of the court of equity.

These positions have not been seriously controverted, and the leading ground of contest arises out of the direction given to the jury by the presiding judge, that if they believed that Betty had been purchased with money furnished by Slappy, they might presume that the trust had been surrendered, which the plaintiff complains of as error. This is clearly not one of the cases in which presumption stands in the place of proof. That doctrine applies only in those cases where the proof of one fact leads us to conclude that it could not well exist without having been attended by some other, as in the familiar case of presuming a grant from long and uninterrupted possession. Now, proof that William Guphill purchased Betty for defendant's wife with money furnished by George Slappy, although it constitutes a resulting trust, does not necessarily lead to the conclusion that he had also surrendered the trust. Indeed, the converse is necessarily true, for, according to this presumption, the trust would be annihilated by the very act which created it. There are, however, other circumstances which are relied on to show a surrender of the trust, which I will now proceed to notice. They consist, first, of the declarations of William Guphill and the plaintiff, that these slaves belonged to defendant's wife; and, secondly, of the delivery of them to her mother by him. If these declarations stood alone, they would, perhaps, justify the conclusion; but when connected with the circumstances, according to the defendant's own showing, they are perfectly consistent with the plaintiff's right of possession. If,

as the defendant contends, the plaintiff and her late husband were possessed of the slaves as trustees to the use of his wife, the declaration that they belonged to her must have been made in reference to that state of things, as no surrender had ever been made either to her or himself; and all the rights of that relationship must of course remain.

The delivery to the mother of defendant's wife, as explained by the evidence on the part of the plaintiff, was in the nature of a loan to her; but if that act was even intended as an execution or surrender of the trust, it could not so operate, because her mother was incompetent to accept it, and to discharge William Guphill. His liability would have remained the same, notwithstanding the acceptance of the mother, unless she had made the surrender, and so far from it, she restored the possession to him. The defendant intermarried with his wife before the death of William Guphill; and if a surrender by him be conceded, then the rights of the defendant would be barred by the statute of limitations, as the plaintiff had the actual possession for more than four years after the death of her husband; and the only possible mode of preventing the operation of the statute is by placing her in the situation of trustee. In that situation she is entitled to retain the property under the principle before laid down, until she surrenders it voluntarily, or until she shall be decreed to do so by a court of equity. There is no foundation for the pretense that she has done any act amounting to a surrender of the trust, admitting that she held in that character. The motion for a new trial must therefore be granted.

Motion granted.

RESULTING TRUSTS.—See *Hall v. Sprigg*, 12 Am. Dec. 506, and note.

STATE v. SMITH.

[1 BAILEY'S LAW, 283.]

CONDITION ANNEXED TO PARDON.—The governor may annex to a pardon a condition that the person pardoned shall leave the state and never return to it; and if he violate the terms of the pardon, he will be remitted to his former sentence, even though such sentence extends to depriving him of his life.

ILLEGAL ARREST OF PRISONER IN ANOTHER STATE.—Where a felon convict flees into another state to avoid the execution of his sentence, and is pursued and brought back, although in an illegal manner, he will still, as the state from which he fled, be liable to punishment for his previous offense.

THE defendant was in 1821 convicted of stealing a slave and sentenced to death; but was pardoned by the governor on condition of his remaining in jail until the first of January, 1823, and then within fifteen days leaving the state, and never returning. He accepted the pardon, and within fifteen days after his liberation went to North Carolina, where he remained until 1827, when he returned to South Carolina, and remained there until July, 1829, on the sixth of which month the governor of this state issued a proclamation, stating that he was at large in the state in violation of the condition of his pardon, and offering a reward for his apprehension. The defendant then fled to North Carolina, where he was soon after forcibly seized by certain citizens of this state without any warrant or authority of law. He was brought back to this state and lodged in jail. He was then brought before Chancellor Harper, at Columbia, on *habeas corpus*, and a motion made for his discharge, principally on the ground that his arrest, and therefore his detention, were illegal. The motion was refused, and the defendant remanded. He was then brought up on motion of the circuit solicitor, to answer to a rule, to show cause why his original sentence should not be executed, and a day fixed for his execution. He showed for cause that he had received an executive pardon, all the conditions of which he had performed except that which prohibited his return to the state, which, it was submitted, was illegal and void. And for further cause, that he had been illegally seized in North Carolina, and brought within the jurisdiction of this state without his consent. It was insisted, therefore, that he was not amenable to the courts of this state, but was entitled to be sent back to North Carolina, or to be discharged and allowed to return thither. The judge held the causes shown insufficient, and made the rule absolute. The defendant now moved to reverse this decision, and to be discharged, on the following grounds: 1. That the governor has no constitutional authority to impose banishment as one of the terms of a pardon; that the defendant, having suffered the imprisonment constitutionally imposed, was entitled to be discharged from the punishment of death; 2. That the courts can not legally aid the executive in enforcing the terms of a pardon; 3. That the sentence on the defendant can not be enforced without violating the rights of North Carolina, where he was illegally arrested.

Blanding and McCord, for the motion

Evans, solicitor, contra.

By Court, JOHNSON, J. The power of the governor to pardon offenses against the state is derived immediately from the constitution, the seventh section, article 2, of which provides, that "he shall have power to grant reprieves and pardons, after conviction (except in cases of impeachment), in such manner, on such terms, and under such restrictions, as he shall think proper; and he shall have power to remit fines and forfeitures, unless otherwise directed by law." The first ground of this motion denies that the governor had, under this power, the right to superadd, as a condition of the pardon granted to the prisoner, the further condition, that he should leave the state, never again to return; and hence concludes, that the condition as to the imprisonment having been performed, the pardon became absolute. If we take the terms literally, there are no words known to our language which could express more fully an unlimited power over the subject than those used in the constitution. But words are to be construed with reference to the subject-matter to which they relate, and we must, therefore, in determining the boundaries and extent of the power, constantly keep in view the object for which it was granted. A pardon *ex vi termini* presupposes a wrong done, or an offense committed, and forgiveness of the offender by the party injured; and as the act of pardoning must necessarily be voluntary, the injured party must have the power of prescribing the atonement to be made, and it as necessarily follows, that the offender has the right to accept or not to accept the terms proposed. He may prefer to make the reparation demanded by the law, for the wrong done or offense committed, or the atonement substituted, at his election. It would seem, therefore, that the executive, even without the express authority given by the constitution, to impose terms on granting a pardon, would have the right to impose them; and all the common law writers agree, in so many words, that the king, as incident to the power of pardoning, has the right to annex such conditions as he pleases; and that whether precedent or subsequent: 4 Bl. Com. 401; Co. Lit. 274, b.

It follows, then, that a condition annexed to a pardon, is, in effect, a contract between the executive and the offender, and must be construed by the same rules which apply to other constitutional grants; and these, I think, furnish us with a safe and salutary check over the otherwise unlimited power which the terms of the constitution appear to have vested in the executive.

By the common law, a condition against law, or one which

was in itself immoral or impossible, is void. And as between private individuals, the grant will be void if the condition be precedent; but if it be subsequent, it is good. As if a man be bound upon a condition that he will kill J. S., the bond is, for that reason, void. But if a man make a feoffment upon the condition that the feoffee shall kill J. S., the estate is absolute and the condition void: Co. Lit. 206, b. If, therefore, the executive annex to a pardon a condition which is immoral, unlawful, or impossible, the condition is, necessarily, void; and whether the pardon will be allowed or not, must depend on the legal effect of the condition, of which I shall have occasion to speak more fully hereafter. It is maintained with great earnestness by the counsel for the motion, that it is unlawful for the executive to substitute any punishments, except such as is known to the law, as a condition of a pardon to a criminal; and hence, it is concluded that as banishment is not known to the law, this condition is void, and the prisoner is entitled to be discharged. This argument is founded on the assumption that the books furnish no case in which any other has been substituted. Without conceding this fact, or that banishment was not a punishment known to the common law, it is, perhaps, a sufficient answer, that the authorities do not show the contrary; and if the rule before laid down be correct, there can be no other limitation to the power than that the condition shall be possible, moral, and legal.

The power to pardon unconditionally will not be denied, and will it be contended for the prisoner, that if a condition is annexed, it must consist of a punishment? May he not substitute as a condition, that which is not injurious to the offender, and which, if left to himself, he might do of his own accord, as that he should ask forgiveness of the party injured? And if that was a condition precedent, would his counsel then contend that the pardon was, therefore, void? And yet this is not a punishment known to the law.

It is said, moreover, that the substitution of banishment is illegal, as it has the effect of casting our convicts on our sister states or foreign nations, and is, therefore, void. The same answer will equally apply to this argument. We have no law which prohibits it; nor is there anything in the constitution of the United States, or the laws of nations, which forbids us to cast off offensive members of society. A foreign state, it is true, is not bound to receive and entertain them; and if they forbid it, his entry into their territory is a violation of their

laws, but one for which he alone is responsible. The substitution of banishment for death is practiced by all nations; of which the late revolutions in Europe, and the disaffections in Ireland, furnish many, and some illustrious examples; and in mercy to mankind, it is hoped there will still remain, somewhere or other, a shelter for the oppressed, although the undeserving may also find a refuge there.

The second ground of the motion denies that the courts possess the power to aid the executive in enforcing the terms of the pardon, and therefore it is contended that he ought to be discharged. Abstractly this proposition is correct; for there is no process known to our law by which the court can enforce the condition of banishment, or, indeed, any other which the executive might impose. From its very nature, the thing must be done or submitted to, by the offender, of his own accord; and this objection is wide of the mark in supposing that that is now the subject of inquiry. The prisoner has been legally convicted of a crime for which his life is forfeited, and he was called on to show why the sentence of death, pronounced against him, should not be carried into execution; he showed for cause, a pardon from the executive, to which the condition before mentioned is annexed, and the simple question is, whether the pardon is, or is not, to be allowed.

It has already been sufficiently shown that the terms or conditions of the pardon are lawful, and, therefore, binding on the prisoner, and that his returning to the state was a violation of them; and the question now is as to the consequences. For the prisoner, it is said that the pardon took effect from his acceptance, and the breach of the condition, in returning again to this state, constitutes the only offense, if that be one, for which he is answerable; and on the other hand, it is said that the violation of the condition rendered it null and void, and left the conviction and sentence in full operation against him; and this leads to the consideration of the effect of the terms on which this pardon was granted. Every condition to a grant, whether it be precedent or subsequent, operates to invest the grantee with the thing granted, and leaves the condition executory or as a defeasance on the non-performance of the condition; and it would seem that in the construction of the grant of a private person, express words of limitation or reservation are necessary to prevent the investiture. But a different rule prevails in the interpretation of a grant from the king. On this subject Lord Coke remarks: "If a man maketh a feoffment in

fee, *ad faciendum*, or *faciendo*, or *ea intentione*, or *ad effectum*, or *ad propositum*, that the feoffee shall do, or not do, such an act, none of these words make the state in the land conditional, for in judgment of law they are no words of condition; and so it was resolved, Hill, 18 Eliz. in Com. Banc., in the case of a common person; but in the case of the king, the said, or the like words, do create a condition; and so it is in the case of a will of a common person, which case I myself heard and observed:" Co. Lit. 204 a. And the reason of this distinction, particularly as applied to a pardon, or the will of a private person, and in this respect they are analogous, will be found in the circumstance that neither the person pardoned, nor the legatee, is bound to accept, nor is there any means of enforcing the condition. To entitle them to take the benefit intended, they must perform the condition annexed to it; for that is the only conclusive evidence of their assent. According to this rule, the prisoner's violation of the terms of the pardon, in returning to this state, operated as a defeasance, and left the sentence in full operation against him.

In connection with this subject, the case of *The King v. Miller*, 2 W. Bl. 797, was relied on, as showing that a violation of the condition of a pardon is the subject of a new prosecution; from whence it is concluded that the prisoner could not be remitted to his former sentence. But that indictment was evidently founded on some of the many English statutes regulating that subject, some of which impose additional penalties; for there is no rule of the common law on which such a prosecution could be supported. On the contrary, it would seem to be a fair inference from the case of *The King v. Madan*, 1 Leach, 263,¹ that a new indictment was not necessary; for although the precise point was not decided, the difficulty did not arise out of the question whether the prisoner should be remitted to his former sentence, but whether the old offense was not merged in the new offense, created by statute, of returning from transportation. It is, however, expressly laid down by Sergeant Hawkins, that, when a condition is annexed, the validity of the pardon depends on its performance: 2 Hawk. P. C. 294, c. 73, sec. 45. The case of *The State v. Mary Fuller*, 1 McC. 178, is directly in point as to the preceding questions; for notwithstanding the effort of counsel to distinguish them, the cases are substantially the same; and I have been induced to enter upon the consideration of the subject again, merely on account of its

1. 1 Leach, 223.

importance to the prisoner, and its involving the construction of a power conferred by the constitution, every provision of which should be carefully preserved and well understood.

The third and only remaining question is, whether the prisoner is entitled to be discharged, in consequence of having been illegally arrested in North Carolina, and brought into this state. The pursuit of the prisoner into North Carolina; and his arrest there, was certainly a violation of the sovereignty of that state, and was an act which can not be commended. But that was not the act of the state, but of a few of its citizens; for which the constitution of the United States has provided a reparation. It gives the governor of that state the right to demand them of the governor of this, and imposes on the latter the obligation to surrender them; but until it is refused, there can be no cause of complaint. And supposing it otherwise, and that the outrage furnishes just cause of complaint, or that North Carolina had declared war against us, how can the court know that the restoration of the prisoner would appease her? Or if it did, by what process would the court send him there? All that we could do would be to set him at liberty, without the certainty of his returning.

The arguments in support of this position have assumed that the prisoner was a citizen of North Carolina; but that, if it even were material, is not true in point of fact. He had resided there, it is true, for several years; but immediately previous to his arrest, he was a resident in this state, and fled, in all probability, for the purpose of avoiding it. The case, then, is this: A felon convict flies into North Carolina, to avoid the execution of his sentence, and is pursued and brought back; and although the manner of doing it was illegal, the thing was in itself right, and exactly what North Carolina was bound to do, if it had been properly required. Under these circumstances, it is not to be supposed that the measure of reparation, which she would demand, would be very exorbitant. But however that matter may be, it does not come within the control of the court, but belongs to the executive department of the government. The prisoner is an offender against our laws; and to them he owes atonement.

Motion refused.

CONDITIONAL PARDON.—The principal case is a leading one upon these questions: 1. Has the executive the power to grant a conditional pardon? and if so, 2. What legal consequences follow if the person pardoned refuses to accept the condition, or after accepting it, fails to comply therewith? The

authorities now seem to concede that the power to pardon includes the power to annex a condition to such pardon; and further, that the failure to accept the condition, or to comply with it, when accepted, renders the pardon inoperative and void, and the criminal liable to the same punishment to which he had been sentenced when the pardon was granted: *People v. Potter*, 1 Parker, 47; S. C., N. Y. Leg. Obs. 177; *Ex parte Wm. Wells*, 18 How. U. S. 314; *U. S. v. Wilson*, 7 Pet. 150; *State v. Fuller*, 1 McCord, 178; *State v. Addington*, 2 Bai. Law 516. "The governor may annex to a pardon any condition precedent or subsequent not forbidden by law, and it lies upon the grantee to perform the condition. If he does not, in the case of a condition precedent, the pardon does not take effect; in case of a condition subsequent, the pardon becomes null; and if the condition is not performed, the original sentence remains in full vigor, and may be carried into effect:" *Flavel's case*, 8 Watts & S. 199.

BELL v. NEALY.

[1 BAILEY'S LAW, 312.]

DOWER, WHEN WIFE BARRED OF.—A wife who elopes from her husband and lives in adultery, is barred of her dower; and if she is compelled to leave her husband, but refuses to return when he offers to take her back, and she afterwards lives in adultery, she is barred of dower.

THE FACT OF ADULTERY MAY BE TRIED on the widow's application for dower.

DOWER to recover the wife's dower in lands of which her first husband, Joel Sims, had been seised in his life-time and which were now in the possession of the defendant. The defendant pleaded *n'unesques seisie que* dower; *n'unesques accouples en loyale matrimonie*; and that the wife had eloped and lived in adultery during the life of the husband. Issue was taken on all the pleas. At the trial the only question was upon the third issue. It appeared in evidence that the wife was compelled by the husband's ill-treatment to leave him; but that he afterwards frequently solicited her to return and live with him, which she refused to do, saying that she never liked him. A year or two after he married another woman, and she married a man named Graham, with whom she cohabited during the life of her first husband. After the death of both of them she married her present husband. The judge was of opinion that she was barred of her dower by the Stat. Westm. 2, 13 Edw. I., c. 34, which has been expressly made of force in this state: "If a wife willingly leave her husband and go away, and continue with her advouterer, she shall be barred forever of action to demand her dower, that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in

which case she shall be restored to her action." That it was clear, on authority, that although her departure had been compulsory, if she voluntarily remain with her adulterer, when the husband is willing to take her back, she is barred by the statute. Thus it is laid down in 2 Bac. Abr. 384, Dower, F: "Although she does not go away *sponte sua*, but is taken against her will, yet if after she consents and remains with the adulterer, she shall lose her dower; for the remaining with him without reconciliation is the bar of the dower, and not the manner of her going away." And on the same page: "If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower; but if after such ravishment she consent to remain with him she shall lose it; so if she voluntarily go away from her husband, though she remain all her life-time with the adulterer against her will, or if she remain not with him, but he turn her away, yet she shall lose her dower." And in a subsequent passage: "If a man grants his wife, with her goods, to another, and she lives with the grantee all the life-time of the husband, yet she shall lose her dower, by reason of living with him in adultery. And where such grant was pleaded, it was holden: 1. That the grant was void; 2. That it did not amount to a license; or, if it did, that it was void; and, 3. That after the elopement there shall be no averment admitted *quod non fuit adulterium*, though the grantee and the woman married after the husband's death." In this case the cohabitation of the wife with Graham was no less adultery because they had gone through the form of a marriage ceremony; and she was, therefore, barred of her dower. The jury found for the defendant, and the demandants moved to set aside the verdict on the ground of misdirection.

Caldwell, for the motion.

Thomson, *contra*.

By Court, JOHNSON, J. The court concurs with the presiding judge, for the reasons he has given on all the questions he has discussed. But it has been suggested here, and perhaps for the first time, that under the provisions of the statute, to bar the wife of her dower, she must stand convict of the adultery, and that proof of the fact could not be given in evidence in a suit at law for dower. This, it will be recollected, is an English statute, made of force in this state. In that country, the spiritual courts have exclusive jurisdiction of questions of adultery; and I am not prepared to say, nor is it necessary to the investi-

gation of the question now made, that nothing short of a conviction of the wife for the offense could have been pleaded in bar to her right of dower. But we have no ecclesiastical court here, nor any other tribunal possessing immediate jurisdiction over the subject; and unless the courts of law can try the fact when, as in this case, it arises collaterally, it never can be tried. Now, when the legislature incorporated this statute into our laws, it was certainly intended to give it some effect, and if, as this argument supposes, the courts of law are incompetent to try it, this intention would be defeated. Of necessity, therefore, it must be tried in this way.

Motion refused.

ADULTERY AS A BAR TO DOWER.—The principal case is cited with apparent approval in *Reel v. Elder*, 62 Pa. St. 316. In the last-named case, the plaintiff, Amelia Elder, had intermarried with John Elder, in November, 1841, who about two weeks later abandoned her and went to Tennessee and remained about twelve years. His wife gave birth to a daughter soon after her abandonment, and about six years later had a child by some other man in Pennsylvania. In 1867 she brought an action of dower *unde nihil habet*, against John Reel, the vendee of a farm which formerly belonged to her husband, John Elder. The court, Sharswood, J., delivering the opinion, thus disposed of the claim, that she was barred from maintaining the action by reason of her having committed adultery: "At common law, adultery was no bar of dower; for, says Lord Coke, 'It is necessary that the marriage do continue, for if that be dissolved, the dower ceases, *ubi nullum matrimonium, ibi nulla dos*. But this is to be understood where the husband and wife are divorced *a vinculo matrimonii*, as in case of precontract, consanguinity, affinity, etc., and not *a mensa et thoro*, only for adultery.' Co. Lit. 32, a; 2 Inst. 435; Sir William Grant in *Seagrave v. Seagrave*, 13 Ves. 443; *Bryan v. Bachseler*, 6 R. I. 546. But the law was changed in this respect by the Statute of Westminster, 13 Edw. I., st. 1. c. 34 (Rob. Dig. 188), by which it was provided, 'that if a wife willingly leave her husband and continue with her avouter, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him; in which case she shall be restored to action.' As well by the express words of this statute as the uniform construction put upon it by the courts, elopement, or, perhaps, to speak more accurately, a voluntary separation, or departure by the wife from her husband, as well as adultery, is necessary to make the bar complete: Co. Lit. 32, b; 2 Inst. 435. It is true that this elopement need not be with the adulterer, for even where there has been a voluntary separation by mutual agreement, the statute applies: *Hethrington v. Graham*, 6 Bing. 135. It is still necessary, however, that she should have separated herself from him *sponte*—willingly. The provision of the statute is comprehended shortly, as Lord Coke tells us, in two hexameters:

Sponte virum mulier fugiens et adultera facta,

Dote sua careat, nisi sponsi sponte retracta:

Green v. Harvey, Roll. Abr. 680; Bac. Abr., tit. Dower, F.; *Stegall v. Stegall*, 2 Brock. 259; *Coyne v. Tibbetts*, 3 N. H. 41; *Shaffer v. Richardson*, 27 Ind.

122; *Walter v. Jordan*, 13 Iredell, 361; *Bell v. Nealy*, 1 Bailey, S. C. 312. Now there was not only no evidence that the plaintiff had willingly left her husband, but the proof was direct, positive, and uncontradicted, that he had deserted her. He did not request her to go with him, nor even inform her of his intention. He left her clandestinely, on the false pretense that he was going a-gunning, and was absent for several years. His own crime of unfaithfulness to his marriage vows exposed her to seduction, and that she fell was as much his fault as hers. The industry and zeal of the plaintiff's counsel has found a case in point, decided in the common pleas of upper Canada: *Graham v. Law*, 6 Jones, 310; but it required no authority to sustain so plain a position:" *Reel v. Elder*, 62 Pa. St. 316.

AM. DEC. VOL. XIX—44

CASES
IN THE
SUPREME COURT
OF
VERMONT.

ADAMS v. HALL.

[2 VERMONT, 9.]

FOR JOINT INJURY DONE BY DOGS owned by separate owners, an action of trespass against such owners will not lie.

TRESPASS. Plaintiff declared against the defendants jointly that two dogs of the defendants worried and killed the plaintiff's sheep. The action was brought under the statute as quoted in the opinion. Plea, not guilty, and issue to the country. It appearing that the defendants were not the joint owners of the dogs, but that Hall was the separate owner of one of them, and Cootwire of the other, a nonsuit was ordered. Exceptions were taken, and the cause was removed to this court for a hearing upon the exceptions, accompanied with a motion to set aside the nonsuit, and for a new trial.

Allen, for the plaintiff, in support of the action, cited *Govet v. Radnidge*, 3 East, 62; 2 Saund. 117, c; *Bex v. Clark*, Cowp. 612.

J. C. Thompson, contra.

By Court, **HUTCHINSON, J.** If the testimony adduced by the plaintiff on trial was of a character adapted to the issue, so that gaining credit with the jury, it would entitle the plaintiff to a verdict, then the nonsuit must be set aside, and a new trial granted. If otherwise, the nonsuit must stand.

The section of the statute upon which this action is founded, reads as follows, to wit: "If any sheep shall be worried, wounded, or killed by any dog or dogs within this state, the owner or keeper of such dog or dogs shall pay to the owner or

owners of such sheep, so worried, wounded, or killed, just damages, to be recovered by action of trespass, founded on this statute, together with costs, before any court proper to try the same." As this action would not lie at all for the mere act of the dogs without the act was procured or occasioned by the defendants, but the action must have been case, alleging that the dogs were accustomed to bite, and that known to the defendants, it becomes important to ascertain upon what the liability depends, but the express provisions of the statute. And it appears very plain that two things must concur to render any man liable to this action of trespass: 1. There must have been a worrying, wounding, or killing of sheep, or of a sheep, by some dog or dogs; and, 2. The man charged with the payment of the damage must be either the owner or keeper of the dog or dogs that do the mischief. This is correct and proper; for men who own or keep and have the care of dogs should own and keep such as will not do mischief of this kind, or so keep and take care of them as wholly to prevent such mischief. Being owner or keeper has an equal tendency to create the liability.

The defendants in this case are charged as being owners of the two dogs that acted together in killing the plaintiff's sheep. But it came out in testimony that they were not joint owners, but each owned separately. Hall was under no obligation to keep the other defendant's dog from killing sheep; nor *vice versa*. Then shall each become liable for the injury done by the other's dog, merely because the dogs, without the knowledge or consent of the owners, did the mischief in company? We think not. If two men having separate servants, separately send them to do one and the same thing, and they, in doing it, occasion an injury to any one, for which their masters would be liable, they would be jointly liable, by reason of their sending them to act jointly. But they would not be liable either jointly or severally for trespasses done by their servants when not in their masters' business. Nor would they be jointly liable if the servants had been sent each to do his master's separate business. If they were to be charged otherwise than thus, by reason of any express statute, they must be brought within the express provisions of such statute.

At common law a man may keep a dog or dogs with impunity, so long as he does not know that they are accustomed to bite or do mischief. If he keep them after he possesses such knowledge, he is liable for the consequences in an action

on the case. If two were partners in the keeping of the dog or dogs thus accustomed to bite, with their knowledge, they would be jointly liable. But an action of trespass is here brought, not for damage which the defendants did by setting their dogs to worry the plaintiff's sheep, but for the worrying and killing by the dogs, without any blame on the part of the defendants. The action is brought upon the statute, and would not lie at the common law; nor can it be sustained, unless the defendants are brought within the provisions of the statute. They are charged with being owners of these dogs. And the charge is well enough; for they might be joint owners. But the charge is not maintained by showing each to be the separate owner of one dog. Nor is this a case in which one might be charged and the other not. There is no rule of law to fasten the liability upon either in preference to the other. They both stand alike in every respect. Either, sued separately, might be liable for the charge; that he was owner of the dogs would be true as to one at least, and that would render him liable for the injury. But the charge; that both were owners of the dogs was not proved by the plaintiff's testimony, allowing it all to be true.

The case cited from 2 Conn.¹ is exactly and fully in point to support this nonsuit. While the non-importation act of the United States was in force, it rendered the owner of goods imported liable to pay to the United States three times their value. It was very common for the same vessel or vehicle to bring at the same time many packages, of which each had a separate owner, who, of course, forfeited the treble value. But it was never supposed that all those separate owners could be made jointly liable for the treble value of all these goods; nor could such an action ever have lived through any court. This is the very case before us. In designating the person liable, in either case, we must find the owner. If we would charge more than one defendant, we must find joint owners. As the plaintiff has not done this, the judgment of nonsuit must be affirmed, with cost.

JOINT LIABILITY CAN NOT ARISE where an injury is done by animals owned by different persons. There must be a joint interest in the animals, or concert in their use and management, or there can be no joint recovery for the damages occasioned by them. On this point the principal case has been repeatedly followed and approved: *Yeazel v. Alexander*, 58 Ill. 263; *Partenheimer v. Van Orden*, 20 Barb. 479; *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 501; *Denny v. Correll*, 9 Ind. 73; *Little Schuylkill N. Co. v. Richards*, 57 Pa. St. 147.

1. *Russell v. Tomlinson*, 2 Conn. 204.

WILLIAMS v. HICKS.

[2 VERMONT, 36.]

EVIDENCE THAT AN INVENTION WAS USELESS, and of no value, can not be given under the general issue pleaded to an action on a promissory note given for a certain patent right of the payee.

FALSE REPRESENTATIONS BY A VENDOR, which are not shown to have induced the purchase, and the falsity of which the vendee might have discovered with diligence, do not constitute a fraud avoiding a promissory note given for the purchase price.

ACTION by an indorsee against the makers of a promissory note. Plea, the general issue. The note was the fourth of five similar notes given by the defendants to one Mixer for the purchase of his patent right of making, using, and vending saddles, called Mixer's patent spring saddle. The defendants offered to prove that, as an inducement to the purchase, Mixer falsely represented that one Hayes, a saddler, had offered him three hundred dollars for the right to use, make, and vend the saddle in the three upper counties of this state; that the defendants relied upon these representations; that Mixer also represented that his charge for a license for making his saddles was three dollars each; that this representation was false. This evidence was admitted against the plaintiff's objection. The defendants also introduced testimony tending to prove that the first three notes had been paid, and that the patent was useless, of no value, and a vile cheat.

The plaintiff introduced evidence of the value of the invention, and also testimony tending to prove that after the note was indorsed, it was taken by the indorsee to the defendants, one of whom said it was good and would be paid when due. The jury were instructed that if the representations of Mixer, as testified to, were made by him, and were false, and were relied on as true, they constituted a fraud and deceit, of which the defendants might avail themselves; that the only effect of the statement to the indorsee would be to show that the defendants were not deceived by the representations, and that if the invention was useless or of less use than represented by Mixer, the jury should consider the measures resorted to by him to induce the defendants to purchase.

Verdict for the defendants, and motion for a new trial, founded on exceptions to the instructions to the jury.

Williams and Collamer, for the plaintiff, cited 1 Salk. 211; *Vernon v. Keyes*, 4 Taunt. 488; 2 Stark. Ev. 467, note; *Anthon's N. P.* 87.

Hutchinson, contra.

By Court, PADDOCK, J. The defense against a recovery in this case appears to be, first, that there was no consideration for the giving of the note in question and the four others, the patent right, for the purchase of which they were given in payment, being useless and of no value at the time of the purchase; and secondly, that Mixer, the vendor, to whom the notes were executed, made use of false and deceitful representations to the defendants at the time, to induce them to purchase.

The plea in this case being the general issue, almost every matter may be given in evidence under it which goes to show that the plaintiff had no cause of action at the time he prayed out his writ; for the action being founded on the contract or promise of the defendant, anything which disaffirms the obligation of the contract at the time the action is commenced, goes to the gist of the action: Chitty's Pl. 465. The want of a sufficient consideration for the promise, or that the consideration had failed after the promise was made, would form a good defense to the action, the evidence of which would be admissible under this plea: *Sill v. Rood*, 15 Johns. 230.

But the law seems to be well settled that a partial failure of the consideration for a promise can not be set up as a defense in a suit brought upon it, under the issue of *non assumpsit*, and more especially where the suit is upon a promissory note; for it would operate as a constant source of surprise upon plaintiffs, against which they would not be prepared to defend: *Sill v. Rood*; *Temple v. McLacklan*, 2 New Rep. 136; *Farnsworth v. Garrard*, 1 Campb. 38; *Basten v. Butler*, 7 East, 479,¹ and *Brown v. Davis*, in n.² How much weight the jury gave to the testimony given in the trial "that the patent was useless, and of no value, and a vile cheat," under the instructions of the court, "that if they found the patent to be of no value, or that the discovery was no improvement, or a much less improvement than represented," etc., we can not tell, other than it gave to the jury great latitude. The difference in profit between making saddles upon Mixer's plan, or in the ordinary method, was not what the defendants purchased; but it was the right of using and improving Mixer's patent, or, in other words, a license to make saddles after the manner and fashion described in his letters patent, and whether the discovery was valuable, or an improvement, or not, whether profit or loss would be the fruit of making saddles according to it, can not affect the consideration of the notes

1. *Basten v. Butler*, 7 East, 479.

2. *Broom v. Davis*, 7 East, 479, in note.

given, as it is a naked purchase. It would be a different question had the patent been vacated or overturned; at least, there would be some grounds upon which the defendants could make a claim upon Mixer for such proportion of the sum paid as the time they then had the right of using it by the contract bore to the time they had actually improved it; which would be according to the decision in *Taylor v. Hare*, 1 New Rep. 260. But it is there said, that in Arkwright's case, though it was vacated before the time in which it would have expired, yet no money was ever recovered back, notwithstanding large sums had been paid for the use of it. We are next to see if any fraud was practiced upon the defendants by Mixer, which led them into the trade. The evidence to support the charge was, "that Mixer, to induce them to purchase, informed them that Newton Hayes, a saddler in the town of Burlington, had offered him three hundred dollars for the three northern counties in this state," and the defendants relied upon the representation, supposing it to be true, but which proved to be false. Also, "that his uniform price for license to make said saddles was three dollars each, and that he had sold so in New Hampshire, which was also false."

To support a defense upon a charge of fraud, it must be clearly alleged to have been committed by the plaintiff, and a damage resulting from such fraud to the defendants. The fraud must consist in depriving the defendants by deceitful means of some benefit which the law entitled them to demand or expect: *Vernon v. Keys*, 12 East, 636. Where are we to look, in this case, for either the fraud practiced upon the defendants by Mixer, or damage which they have sustained by means of any art or representation of his at the time of the sale? The case which the parties mutually made out, and have presented to this court, as a bill of exceptions, though not certified as such from the court below, does not instruct us whether the defendants purchased any, and if any, what portion of the state or United States, of Mixer. It says, "the notes were given by the defendants for the purchase from Mixer, of his patent right for making, using, and vending saddles." From which it would be too much to infer that the purchase covered either the three northern counties in this state, or the state of New Hampshire; and if neither, how they have sustained any damage from his representations as to what Hayes would give, or what he sold privileges for in New Hampshire, we are left to conjecture.

It may be remarked, too, that the defendants do not say they

were influenced or induced by his representations to purchase of him; and it certainly is not for the court to say that they were. Nothing is more difficult than to tell the moving cause to another man's action. If the inducement to purchase did not proceed from the representations, then the damage disappears at once, however losing their bargain may have been. As it respects what Mixer said of his price for selling licenses for making single saddles, and that he had sold so in New Hampshire, the declaration, if it can amount to anything, was too general to admit of the falsity being proved by showing individual cases of sales at a less price; for had he sold in any instances, or in any part of the state of New Hampshire, at three dollars, his representation would have been true.

But admitting the fact that the defendants did purchase the right as to the three northern counties, and that he made the representation of Hayes' offer, and that his uniform price for licenses to make saddles was three dollars each, and he sold so in New Hampshire, and that both of those representations were false; according to a rule laid down by Lord Ellenborough, in *Vernon v. Keys*, a damage must result from such false representation in order to constitute a fraud, and that clearly alleged; saying that "the patent was useless, and of no value, and a vile cheat," is not sufficient; all that might have been true, and perfectly understood by the parties at the time.

This case compares fully in principle with that of *Vernon v. Keys*, which was first decided in the king's bench in 1810, and afterwards removed into the exchequer chamber, and decided again in 1812, both courts concurring in the opinion that the misrepresentation was not of that character which could constitute a fraud; and in the latter court, Mansfield, C. J., says: "It is no more than what every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase." 4 Taunt. 494.

The case of *Bayley v. Merrill*, Cro. Jac. 386, is also in point, which is, that Merrill contracted with Bayley to draw a load of madder a certain distance, at a given price, affirming that the weight was but eight hundred-weight, whereas it was twenty-two hundred-weight, and by means of the difference he sustained an injury; but it was held that the plaintiff might have weighed his load, and not trusted to what the defendant told him. So in the case of *Harvey v. Young*, Yelv. 21, the defendant had a term for years, and in a treaty with the plaintiff for the sale of it, affirmed that it was worth one hundred and fifty

pounds; upon which the plaintiff gave that sum. It proved to be worth but one hundred pounds; but it was held by the court to be but the bare assertion of the defendant, and it was the plaintiff's folly to believe him. Also, in 1 Roll. Abr. 801, pl. 16: "If a man, having a term for years, offers to sell it to another, and says that a stranger would give him twenty pounds for it; by means of which assertion the other buys it, when in truth he was never offered twenty pounds for the term; though he be deceived in the value, yet in truth no action on the case lies." And in the case at bar, if the defendants had an interest in knowing what Newton Hayes had offered Mixer, the distance from Bennington to Burlington was not so great, but that they might easily have applied to him and ascertained the truth; and if they did not, it was their own folly to dispense with that which common prudence required they should have done.

The court are not able to determine upon what the jury founded their verdict; whether they found there was no consideration for the note, or found what they were instructed would be a fraud; either of which they might perhaps have found from the instructions given them by the court, if the same has been truly reported to us in the bill of exceptions. The court are satisfied that the declarations of Mixer, at the time the contract was entered into, were not such as the law will declare a fraud; and also, that the instructions given to the jury in the court below were erroneous; and that the judgment of the county court must be reversed, and a new trial granted.

Judgment reversed.

FRAUD IN SALE OF CHATTELS.—This subject is examined at length in the note to *Emerson v. Brigham*, 6 Am. Dec. 117, 118.

FRAUDULENT REPRESENTATIONS ON SALE OF CHATTELS are considered in the same note.

FAILURE OF CONSIDERATION AS A DEFENSE.—See note to *Le Blanc v. Sanglair*, 13 Am. Dec. 378.

REED v. SHEPARDSON.

[2 VERMONT, 120.]

CREDITORS OF THE FIRM HAVE NO PREFERENCE in Vermont over creditors of individual partners in attaching the property of the firm.

TO ATTACH THE PARTNER'S INTEREST IN THE FIRM GOODS, they must be taken into possession.

OFFICER TAKING FIRM GOODS INTO POSSESSION under an attachment against an individual partner is not liable as a trespasser, though the firm be insolvent.

TROVER. The defendant, a sheriff, had attached an undivided half of certain goods, the property of Joseph and John A. Bascom, partners in trade at the suit of a creditor of John, and had sold the same under the execution issued upon the judgment recovered. The sheriff had moved the articles, at the time of the attachment, from the custody of the firm, and had them safely. The plaintiffs claimed as creditors of the firm; Joseph, John having absconded, had sold the articles in question to the plaintiffs subsequent to the attachment but prior to the sale on execution, in discharge of the firm indebtedness to them. The sheriff had notice of the plaintiffs' claim when he sold, but no offer of indemnity was given. The court instructed the jury to find for the plaintiffs and to assess the damages at the value of the articles without regard to the sum they brought at the execution sale. Verdict accordingly. Motion for a new trial on the ground of misdirection to the jury.

Elliot, for the defendant.

J. Phelps, contra. Partnership funds should be first applied to partnership debts: 1 Cai. 343; 2 Johns. 280; Amer. Dig. 264. The interest, and not the effects, should have been sold: *Huntington v. Lyman*, D. Chip. 438; 1 Swift's Dig. 345; 2 Conn. 514. So also in equity: Swift's Dig. 351. Joseph Bascom had power to sell to the plaintiffs to pay a partnership debt: *Id.* 341; 5 Cranch, 289; Day's Dig. 397; D. Chip. 242.

By Court, HUTTONSON, J. The principal question which we have to decide is, whether the creditors of a partnership firm have such a lien upon the partnership effects, that the defendant is liable in tort, for holding and selling the property in question, upon an execution against one individual of the partnership? I say holding and selling; for the plaintiffs had no pretense of title to this particular property, till long after the defendant attached the same, and held it upon his writ.

The plaintiffs claim that they, as creditors of the firm of J. and J. A. Bascom, had such a lien upon the property, which was perfected into a title to this particular property, by a sale to them in discharge of their debts, against the firm, before the defendant sold on execution. And the defendant contends that his sale was an official duty, giving effect to the attachment he made before the purchase by the plaintiffs; and that neither his refusal to deliver to the plaintiffs, nor his sale of the property, amounted to a conversion. He also denies that the plaintiffs could acquire any title while his attachment was on the property.

There seems no dispute what the law is upon this subject in England and some of the neighboring states; at least, there is none among the members of the court. That law is, as we understand from the books, that the creditors of a partnership have a lien upon the partnership effects of their debtors in preference to the creditors of the individual members of the firm. They have, also, the right to pursue the individual property in common with the creditors of the separate partners; while the creditors of the separate partners have no right against the partnership property, only to take the interest of their debtor in the firm, after the partnership is closed, and that interest ascertained. It is understood, this interest can be taken at any time and sold for what it will fetch. In England, this law took its origin from the same policy whence originated the bankrupt system. The object there is to promote trade; in order to which they use this law to keep up the credit of trading companies. It creates a monopoly of the partnership property in favor of the partnership creditors.

Aside from the question of policy, to promote some natural interest, there is no more reason in this than there would be in giving a like preference to the creditors of the individual partners. There are many cases of partnerships formed by individuals deeply in debt for the property they severally possess, and which is worked into the partnership in such a manner as not to be traced by the prior creditors, and yet there ought to be a lien upon it in their favor. So, there may be cases of partnerships formed by those in debt, who afterwards receive property for the partnership on credit, which may go to pay private debts to the injury of the partnership creditors.

This action is probably the first in which the courts in this state have ever been called upon to apply the law under which the plaintiffs claim. The argument in behalf of the plaintiffs is very ingenious to induce its application here, and to exclude the difficulties heretofore suggested by the court. One difficulty, however, yet remains; we are not sufficiently informed how the creditor of the individual partner can obtain that interest in the partnership property, to which it is conceded he has a right; namely the interest of his debtor. We can easily conceive how, in England and New York, where the property of the debtor is holden from the delivering out of execution, there may be a sale at auction of this interest, because the execution creates a lien without any visible levy and removing the property. We are told this interest is sold in Connecticut, and the purchaser is let

into the former interest of the debtor, whatever that may eventually be. But how the property is guarded against sales by the debtor, and the attachments of other creditors, between the levy and the sale, we are not informed.

In this state we have no method of attaching goods so as to avail the creditor, but to take them and keep them from the debtor, as was done in this case. There is no such thing as attaching, or levying upon the debtor's interest in the goods, and advertising and selling the same, and avoid an intermediate sale by the debtor, but to take the goods themselves from his custody. Just so with regard to the attachments of other creditors, who might have any right to attach. If, then, the officer, taking the interest of the individual partner in the only way in which he can take it and preserve it for his employer, is to be considered as a trespasser, by reason of such taking, or his sale is to be considered a conversion, when the partnership creditors sue him, this amounts to a total sequestering of the partnership property, not only to the use of the partnership creditors, but to the partners themselves, as against the creditors of the individual partners. A decision to this effect would be going great lengths, while our statutes give to the creditors, without distinction, the most unbounded right to secure their debts by attaching the goods and chattels of the debtor, excepting only some articles of necessary use. Upon this point the difficulties under which the court have always labored, have not been removed by the argument of the plaintiff's counsel. We seem to want some statute, prescribing some new mode of keeping property safely during the fourteen days that it must, by law, be advertised before a sale; also, during the pendency of a suit after an attachment; and, without this, an attachment without removal would be a nullity.

The plaintiff's counsel cite the case of *Pierce v. Jackson*, 6 Mass. 242, to show the law he contends for to have been adopted there. In compelling the sheriff to account for the money raised on a sale of partnership goods, the court, in that case, gave a preference to the creditors of the firm; but there the goods appear to have been levied upon and sold, as were these by this defendant. The sheriff was not treated as a trespasser for the taking of the goods. If cases of this kind have before arisen in this state, we believe none have been litigated, and the practical course has been to attach the undivided moiety, as was done in this case; treating the property as holden by a tenancy in common. It must continue to be so treated, or we can

not attach at all, till the legislature interfere and make some new provisions for such a case.

This furnishes an answer to that part of the argument of plaintiff's counsel, which supposes the partnership property to form such a distinct fund as to be intangible by the creditors of one partner. The undivided half is not thus intangible. We need not now decide what would be the effect of a proceeding by the partners, or either of them, or by the creditors of the firm, to bring the partnership to a close, and appropriate the partnership property, first, to pay the debts due from the firm, in preference to the individual debts. Such a proceeding differs much from the one before us, which treats the officer as a wrong-doer.

But it is urged that the officer might apply to chancery, and compel an interpleader to ascertain to whom the property belongs. In this there would be more reason, if the suit sounded in contract; if it was a suit for the money raised by the sale. But, even then, we would not force the officer into a controversy that might outlive his office, and be attended with great expense; more especially would we not do it under circumstances like the present, and let his success in this action of tort depend upon the result of that collateral controversy. The parties themselves should litigate such questions; and if an officer must go into chancery, let him be drawn in as defendant, and not driven in as plaintiff. If the plaintiffs choose to have the question decided in equity, they might bring their bill, and enjoin the defendant from paying over the money while the suit is depending. The case cited by plaintiffs from 1 Burr. is not in point, unless we first decide the property of the firm to be sequestered out of the reach of creditors of each partner. That was a case under the bankrupt laws, and was really a dispute between the sheriffs for one creditor, and the assignees of the bankrupt, for the body of the creditors; and it resulted in a clear case for the assignees; for the act of bankruptcy was committed December fourth, the judgment and execution, and delivery of the same to the defendants, the sheriffs of London, were on the fifth, the commission of bankruptcy on the eighth, and the assignment was the same day, and the sale by the defendants was the twenty-eighth. By the bankrupt laws, the assignment vests the property in the assignees, by relation, at the time of the act of bankruptcy. Hence, that fund was exclusive in the hands of the assignees. As we decide this property to be not so sequestered to the exclusive use of the

creditors of the firm, there is nothing in that case that can govern this.

The plaintiffs further contend, that the case shows the firm of J. & J. A. Bascom to be insolvent, which excludes all idea of any surplus that could belong to the separate creditors. The case does show that the plaintiffs adduced testimony tending to prove this; but it further shows, that no account of the partnership property had been taken, and none was submitted to the jury. Testimony short of this is too vague and uncertain, and ought not to have been admitted to go to the jury for the purpose of showing insolvency. Neither ought it to have been admitted for the further reason that the officer must act, in making his attachment, in reference to such facts as then appear; and he must not be made a trespasser by the result of an accounting afterwards had between the partners. So far as we have now disposed of the case, and if no other point could be urged, the whole testimony ought to have been excluded; for it only tends to support a claim under a law never adopted here. Our statute, adopting the common law of England, adopts it so far only as it is applicable to our circumstances, and not inconsistent with our constitution and laws. The law now contended for is wholly inconsistent with our statutes concerning attaching and levying upon personal estate, and the long usage and uniform decisions that the attaching officer must move the property from the custody of the debtor. It is also inconsistent with our circumstances, as we have no motive to encourage partnerships any more than individual business men. But should the legislature see fit to adopt this law, they can do it, and prescribe a mode to carry it into effect. This was the opinion of Judge Royce, upon the first argument of this case, and is the result to which Judge Prentiss arrived in vacation, as he informed me when he delivered over the papers, a short time since; and we, who are present, are agreed in the same opinion, and a new trial must be granted. The case presents a point, not much noticed by counsel, and which may be important in some future disposition of the cause. The case shows that the defendant had before sold an undivided half of this property, by virtue of other executions against the firm. He now has taken and sold an undivided half of the same by virtue of an execution against one of the members of the firm. It is not readily seen, upon this state of things, why the defendant had a right to take and sell, upon said last execution, any more than one undivided fourth of said property. But the parties, who know the facts

in the case, can present them on a future trial as the merits require. If the defendant took half, when he should have taken but a fourth part, possibly the plaintiff may be entitled to recover a fourth part.

New trial granted.

PAYING INDIVIDUAL DEBT WITH PARTNERSHIP ASSETS.—The doctrine generally prevailing in this country, is discussed in the note to *Dob v. Halsey*, 8 Am. Dec. 297.

NEWBURY v. BRUNSWICK.

[2 VERMONT, 151.]

ORDER FOR THE REMOVAL OF A PAUPER, his family and effects, from one town to another, is valid as to the pauper only.

AGREEMENT TO MARRY PER VERBA DE PRÆSENTI, followed by cohabitation for several years, will be deemed a valid marriage, though not solemnized according to the laws of the place where the contract is made.

APPEAL from an order of the justices of the peace, quashing, as to the family, the proceedings for the removal of "Nathaniel P. Harriman, his family and effects," from Newbury to Brunswick, the appellants having moved to quash the entire proceedings for generality. It was also submitted whether the marriage of Harriman and the woman with whom he had cohabited for eighteen years was valid, it not having been solemnized according to the law of the place where they contracted to live as man and wife, the relation between them commencing by an agreement of marriage *per verba de præsenti*, and being followed by uninterrupted cohabitation.

Cushman and Marsh, for the defendants, contended that the marriage was void: *King v. Luffington*, 2 Bott. 74; S. O., Burr. 232; 1 Wils. 74.

Smith and Berry, contra. The marriage was valid: 6 Mod. 153; 2 Salk. 437; Peake's Cas. 331; 2 Kent's Com. 75, 76, 77, 78; Reeve's Dom. Rel. 196, 200, 290; 3 Marsh. 370; *Londonderry v. Chester*, 2 N. H. 268 [9 Am. Dec. 61]; *Fenton v. Reed*, 4 Johns. 52 [4 Am. Dec. 244].

By Court, Paddock, J. As it respects the decision of the county court in quashing so much of the proceedings in this case as relates to the family of Nathaniel P. Harriman, the pauper, the court were correct. The family ought not to have been named, either in the complaint of the overseers, in the warrant to bring Harriman before the justices, or in the order of removal;

and if they were, it was surplusage, and it was well to have it expunged from the record. But it will be seen, by looking at the third section of the statute, upon which this prosecution is founded (p. 370), that the warrant of removal directs the officer "to remove and transport such stranger, with his or her family and effects (if any he or she have), on the nearest route, to the place of such stranger's legal settlement," etc., and in no other place in the act is the family spoken of. It may be remarked that what is meant in this act by family, are those, and those only, for whose support and maintenance the law obliges a person, whether male or female, to provide; so that no procedure under this statute is intended, nor can it have the effect to divide or break up families; but, on the contrary, the town which is obliged to support and maintain the principal head of the family, be it male or female, is obliged to provide for those who have their residence with such principal.

This case comes before the court upon a statement of facts, made up by the parties, which are, briefly: That on the seventh day of September, 1807, Harriman and one Lydia Page, an unmarried woman, and who is now his reputed wife, went before a justice of the peace in the province of Lower Canada, and there covenanted and agreed, each with the other, to be and remain husband and wife; of which the justice then made a record, from which time up to the commencement of these proceedings, they have cohabited together as man and wife, and have four children, all of which are now under age and live with them. That in June, 1808, Harriman and the said Lydia removed from the province of Canada into the town of Brunswick, where they remained the three succeeding years, gaining a legal settlement therein. Previous to September, 1826, they found their way to Newbury, where they have since resided, but not to gain a settlement. At that time, Harriman being destitute of property, and the woman sick, he applied to the overseers of the poor of Newbury for assistance, who relieved the necessities of the woman and children. In March, 1825, the legislative assembly of the province of Lower Canada passed an act declaring all marriages which had been celebrated in the province before dissenting ministers from the church of England and justices of the peace, to be legal and valid in law.

There is but one question in the case to be decided, and that is whether Lydia Page, otherwise Lydia Harriman, is the wife of Nathaniel P. Harriman; so that under the warrant to remove the said Harriman, it being found that his residence was in

Brunswick, the overseers of the poor of that town were obliged to receive and support the said Lydia and her children as his family. Admitting that the testimony of the woman is admissible to prove that no other ceremonies of marriage have been had between them, other than those before the justice, had Harriman and his reputed wife remained in the province, there is no doubt that the effect of the provincial act of their assembly of March, 1825, would have been to legalize their marriage before the justice, to every intent, for after the usurpation of Cromwell, the British parliament found it necessary to pass a similar statute, by which (12 Ch. II. c. 33) all marriages solemnized before justices of the peace, during that period, were declared valid. And what difference it shall make, their removing into this state before the passage of the act, in March, 1825, the court are not prepared to say, but are strongly inclined to the opinion that the effect is the same as though they had remained, for the statute is not intended to operate upon the persons, but upon the record of the justices, and characterize the transactions before them, and the ministers, giving a legal effect to that which was not so at the time, by reason of the 26 Geo. II., and carrying into execution the wishes and designs of the parties contracting. But however this may be, the court do not find it necessary to decide. To marry is one of the natural rights of human nature, instituted in a state of innocence for the protection thereof, and was ordained by the great Law-giver of the universe, and not to be prohibited by man. Yet human forms and regulations in marriages are necessary for the safety and security of community; but those forms and regulations are to be within the reach of every person wishing to improve them; and if they are not, other forms and customs will be substituted; and such was the case in this instance.

Before the days of Pope Innocent III., solemnization of marriage in churches was not known. After the agreement to cohabit, the man led the woman to his habitation, which was all the ceremony then in use; and though by the English law such a marriage would not entitle the parties to those legal privileges they would enjoy if married according to the forms required by their statute, that is, the man to be tenant by courtesy and the woman to have her dowry, etc.; yet in *Haydon v. Gould*, 1 Salk. 119, it was ruled, that a woman and her issue might claim, though the man should not, a legal privilege given by law, when he had not entitled himself to it, by a conformity to the matrimonial law.

It must, however, be admitted that great convenience is experienced from the celebration of nuptials before constituted authority, for it not only furnishes proof of the best description, but the preservation of it is directed by statute, and easily obtained when needed. But the law treating the mutual agreement of the parties as the marriage, regulating only the manner and form of celebrating it, and preserving the evidence thereof, admits proof other than a copy of the registry, or record of the magistrate or witnesses—the declaration of the man or woman, the continued understanding of friends, and cohabitation, as evidence of the fact. Such was the case in *Leader v. Barry*, 1 Esp. Cas. 353; *Read v. Passer*, Peake's Cas. 230; *Kay v. Duchesse de Pienne*, 8 Camp. 123; *Fenton v. Reed*, 4 Johns. 52 [4 Am. Dec. 244]; and the celebrated case of *Hervey v. Hervey*, 2 W. Bl. 877.

It has been contended by the appellees that the proceeding before the justice of peace in the province did constitute a marriage *per verba de præsenti* between Harriman and Lydia Page. Of that there is little doubt. It was declared by C. J. Holt, in *Jesson v. Collins*, 2 Salk. 437, that a contract *per verba de præsenti* was a marriage, namely: I marry you; you and I are man and wife. And again, he holds similar language in Wigmores's case, p. 438. And in *Fenton v. Reed*, it was determined by the court that a contract of marriage made *per verba de præsenti* amounts to actual marriage, and is as valid as if made *in facie ecclesiæ*. And in *Reed v. Passer*, Lord Kenyon says "that an agreement of marriage between the parties, *per verba de præsenti*, was *ipsum matrimonium*." And as neither our statute, nor that of the 26 Geo. II., declares marriages void which are not consummated according to the provisions of them, no sound reason can be offered why the covenants and agreements of marriage between Harriman and Lydia Page, entered into before the justice, *per verba de præsenti*, followed by cohabitation uninterrupted to the time of the order of removal, should not be deemed as valid to every intent as though made before the altar; especially as it is viewed both in this state and in England in no other light than as a civil contract: 1 Bl. Com. 433. It was a sufficient marrying to bind him to support her, and treat her as his wife; and cohabiting with her for years would bind him to support her children. And it follows that the town which is legally bound to support Harriman, in case of poverty, is bound to provide for all those who have a matrimonial or natural right to be supported by him.

But there is another objection to this defense, too formidable to be overcome; and that is, the long period of time those persons have cohabited together, being more than twenty years, reciprocally discharging every duty, we are bound to suppose, which the relation of husband and wife imposed upon them; surrounded with a family of small children. Is it our duty; does the law require; does the interest of society demand, or respect for the matrimonial institution permit, that in this side-way manner the legality of the marriage should be gone into at all? The court are clearly of the opinion that it can not. The harmony of the two are not thus to be disturbed, nor the children made liable to be bastardized. Therefore, in pursuance of the agreement of the parties, the order of removal is affirmed, and the town of Newbury recover their costs.

Judgment for appellees.

MARRIAGE PER VERRA DE PRÆSENTI.—In the note to *Londonderry v. Chester*, 9 Am. Dec. 61, this subject is considered. That such marriages are valid, see *Fenton v. Reed*, 4 Am. Dec. 244.

BATCHELDER v. CARTER.

[2 VERMONT, 168.]

RETENTION OF POSSESSION ON SALE OF PERSONALTY renders the sale invalid as to creditors.

SHERIFF'S SALES ON EXECUTION where all is in good faith, form an exception to this rule. But an auction sale by a sheriff, made by agreement of parties without previous advertisement, nor under a legal precept warranting it, is not a sheriff's sale, within the exception.

TRESPASS. The case appears from the opinion.

Smith and Peck, for defendant, cited 1 Aikens, 116; 2 Id. 64.

Upham, contra, cited *Kidd v. Rawlinson*, 2 Bos. & P. 58; *Watkins v. Birch*, 4 Taunt. 822; *Cadogan v. Kennet*, Cowp. 432; *Leonard v. Baker*, 1 Mau. & Sel. 251; *Latimer v. Batson*, 4 Barn. & Cres. 652; *Joseph v. Ingram*, 8 Taunt. 838.

By Court, HUTCHINSON, J. The principal question in this case is, whether the possession of the property in controversy was sufficiently changed, from Nathaniel Batchelder to the plaintiff, to vest the same, and render the sale complete as against the creditors of Nathaniel Batchelder. It is scarcely contended by the plaintiff's counsel that here was a sufficient change of possession, according to various decisions of this court, unless this

should be considered a sheriff's sale, like that named in *Kidd v. Rawlinson*, cited by the plaintiff's counsel, and *Boardman v. Keeler*, reported by Aikens. Indeed, there seems to be no change of possession whatever. The same day that the plaintiff bid off the property, N. Batchelder, the former owner, carried, with the sleigh and horses, a load of pork to the plaintiff's house, went home with them, and they were kept at his barn, upon his hay, as before they were attached. Nor was the possession varied by what appears to have been said or agreed about J. W. Batchelder's having them to perform a journey to Boston; for he as yet had no possession or care of them. Was this, then, a sheriff's sale? Carter, the defendant, as a deputy sheriff, had attached the same property upon a writ in favor of Ira Batchelder against N. Batchelder, upon a note owned by Center, Lamb & Co. Carter had kept the property about a week, when, by the mutual agreement of Lamb, N. Batchelder, the plaintiff, and J. W. Batchelder, the property was sold at auction, without any previous advertising. Carter acted as auctioneer; the plaintiff bid off the property in question; and probably J. W. Batchelder bid off the remainder; for he and the plaintiff gave to Lamb their note for his whole debt, being about one hundred and seventy dollars.

The majority of us can not view this as a sheriff's sale. Carter was sheriff, to be sure, and had, for a week, kept the property in his custody under a writ; but that writ authorized no sale, nor was there a pretense of a sale under it. Carter derived all his power to sell from the agreement of the parties, and any other person might as well have been agreed upon as he. And no precept whatever could have authorized so sudden a sale, without the agreement of parties, and such agreement would answer as well without a precept as with. A sheriff's sale, such as was intended in the case of *Boardman v. Keeler*, supposes a judgment establishing a debt due; an execution upon that judgment; that delivered to an officer under oath to be faithful and impartial; a levy upon property by such officer; advertising the same for sale at least fourteen days, naming some public place for the sale; and exposure of the property at public auction by such officer at the time and place thus advertised, so that not only the debtor himself and that particular creditor, but all the creditors of the same debtor, may attend and bid upon the property, and prevent a waste for want of bidders; and, in the end, an official return of the sale by such officer upon such execution, to the office whence it

issued, where it may be seen by any person who may desire to see it. No feature of all this proceeding is apparent in the sale now under consideration. This may have been in some sense public, but yet it must have been casually so, if at all, and was strictly under the private authority delegated to Carter by the parties immediately in interest; he at the same time acting without precept and without oath.

The authorities cited by the plaintiff's counsel upon this point, do not seem entirely parallel with this case. The case of *Leonard v. Baker*, in 1 Mau. & Sel. 251, was this: The owner, one Clee, on the seventeenth of January, made an assignment of all his property to certain trustees for the benefit of his creditors. The trustees advertised regularly, and sold the property on the twelfth of February. The plaintiff, at such sale, bought the household furniture, moved some of it home, and left the rest with his mother for her accommodation. Afterwards the plaintiff hired the house of the landlord, and took possession of the same with the furniture. After all this, Collins attached the goods as the property of Clee, who had absconded. The plaintiff's mother, who was Clee's wife, had used the furniture to entertain lodgers, as formerly; but after the plaintiff had hired the house and taken possession, Collins was informed that the plaintiff was the owner. The plaintiff recovered. As the plaintiff had actual possession before Collins' attachment, the controversy could not have been about fraud in law, but fraud in fact.

The case of *Latimer v. Batson*, 10 Com. Law Rep. 432,¹ was actually a sheriff's sale. The sheriff levied upon the property of the Duke of Marlborough, by virtue of an execution against him. The creditor became the purchaser, and sold to the plaintiff, who put a man in to take care of the property, while the duke used it. On trial the question of possession was considered settled by the sale's being by the sheriff on execution; and the only question left to the jury was whether the sale was *bona fide*, or the purchase made with the money of the duke. Another case is cited, *Jezeeph v. Ingram*, 4 Com. Law Rep. 303.² The observations of the court rather favor the present plaintiff. They grant a new trial, but do not give the best reason for it the facts in the case would warrant. The plaintiff sued Ingram, as sheriff, for a false return with regard to the goods, etc., of Newman; claiming that the goods, once Newman's, but then in possession of one Dunk, were still liable to

1. *Latimer v. Batson*, 10 Com. L. R. 742; S. C., 4 B. & C. 652.

2. *Jezeeph v. Ingram*, 4 Com. L. R. 406; S. C., 3 Moore. 180.

be taken and sold for Newman's debt. The fact was, the sheriff pressed Newman with an execution, and Dunk stepped in and paid the execution, and paid other debts of Newman, amounting in all to four or five hundred pounds; and took a conveyance of Newman's house and farm, and all his personal property except his household furniture; and took possession and care of the same under a contract that he should account, and first apply the profits to pay the interest, and the rest to discharge principal. Newman occupied a part of the house, and that furniture to which Dunk had no claim. Newman did not further intermeddle, except the hiring some few laborers and referring them to Dunk, who employed and paid them. The plaintiff claimed that the defendant, as sheriff, should have sold as Newman's property this personal property in possession of Dunk. The plaintiff obtained a verdict. The court granted a new trial; and, if they had assigned as a reason that the property was in the possession of Dunk, not of Newman, that might have been fully satisfactory without more.

We find nothing in these authorities to support the sale under consideration without a more substantial change of possession than is made to appear. As the court, in their instructions to the jury, treated this as a sheriff's sale, and one that need not be followed by possession, a new trial must be granted. There is another part of the charge that deserves a moment's attention. The request of the defendant's counsel to the court is broad enough to comprise every proper instruction to the jury in the cause. And the court sufficiently instructed the jury not to find for the plaintiff, if the sale to him of the property was not *bona fide*; yet, it appears to me the court did not sufficiently call the attention of the jury to those parts of the testimony which were evidence of fraud in fact. As soon as Lamb's lien was taken off the property by the note of the plaintiff and J. W. Batchelder, N. Batchelder could convey to the plaintiff as good a title without the interference of the sheriff as with. And it seems difficult to conjecture why they should agree upon the ceremony of what they called a sheriff's sale, unless it were considered a mode in which property might be sold, and yet remain in the custody of the former owner, and be safe from the attachments of his creditors. And if such a ceremony would answer that purpose I presume it would be the usual manner of fraudulent conveyances. If the attention of the jury had been pointed to this circumstance, in connection with the fact that no advertisement was posted up to give

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notice to other creditors to attend and bid, for the purpose of saving their debts, and the further fact that the possession remained as it was before the first attachment, I should deem it strange if the jury had not found the sale fraudulent in fact.

The majority of the court reversed the judgment, and granted a new trial.

PRENTISS, J., delivered a dissenting opinion, and TURNER, J., an opinion in support of the judgment of reversal.

RETENTION OF POSSESSION BY VENDOR after the sale of a chattel, when evidence of fraud. The decisions and annotations embracing this question and appearing in this series, are collected in the note to *Babb v. Oleson*, 13 Am. Dec. 691.

SPENCER v. WILLIAMS.

[3 VERMONT, 209.]

DEPUTY SHERIFF TAKING A RECEIPT to himself for property attached by him, may maintain suit thereon in his own name.

IN AN ACTION ON A RECEIPT given for goods attached, the defendant will not be permitted to prove that the goods were not attached, nor were even in the sheriff's possession, nor delivered by him to the defendant.

AGREEMENT NOT TO SUE A CO-OBLIGOR does not operate to discharge the other obligors, and can not be given in evidence in an action against them.

ACTION on a receipt for property attached by the plaintiff, a deputy sheriff. The case appears from the opinion. Verdict for the plaintiff. Motion for a new trial.

Williams and Royce, for the defendants. The suit should have been brought in the sheriff's name: *Smith v. Joiner*, 1 D. Chip. 62.

Bates and Child, contra. The receipt was evidence of a personal contract with the deputy, on which he could sue: *Hutchinson v. Parkhurst*, 1 Aik. 258; *Lyman v. Lyman*, 11 Mass. 317. Covenant not to sue one of two joint obligors is no discharge of the other: *Dean v. Newhall*, 2 T. R. 168.

By Court, PRENTISS, J. The question as to the right of the plaintiff to sue on the contract declared upon, ought properly, as the matter is apparent upon the record, to have been taken by a demurrer to the declaration, or, after verdict, by a motion in arrest of judgment; but as the question was raised and decided on the trial of the general issue, and has been made a

ground of exception, it may be considered as regularly before us. The action is founded on a receipt, or memorandum in writing, executed by the defendants to the plaintiff, in which they acknowledge to have received of the plaintiff certain goods, attached by him as deputy sheriff, on several writs against Jonathan F. Barrett and others, and promise to deliver the goods to the plaintiff on demand. Although the contract is expressed to be made with the plaintiff as deputy sheriff, he appears upon the face of it to have a beneficial interest in its performance. Even an agent may maintain an action upon a contract, made with him as such, where he has a beneficial interest in its completion, or has incurred even a *prima facie* liability by contracting, unless the principal has obtained or required a completion of the contract with himself personally. By the attachment, the plaintiff acquired a special property in the goods, and became answerable for them, and, therefore, has a manifest interest in the subject-matter of the contract. If the goods had been tortiously taken from his possession, he might undoubtedly have maintained an action of trover or trespass for them; and if so, there would seem to be no good reason, when they are delivered by him on a special undertaking to be returned, why he should not maintain an action for a breach of the contract. Being ultimately liable for the goods, it is certainly just to allow him, for his own security, to enforce the contract; and we are not aware of any principle or rule of law which forbids his doing it. Indeed, the contract is, in terms, an express undertaking to the plaintiff, and it grew out of an act which the plaintiff was not bound by law to perform, and which did not, in strictness, result from the powers and duties of his office. The bailment of the goods to the defendants, though lawful, was not an official act, done in the execution of authority derived from the sheriff, and necessarily to be deemed the act of the sheriff.

But in the case of *Davis v. Miller*, 1 Vt. 9, in Chittenden county, December term, 1826, it was decided that in the common case of bailment by a deputy sheriff of property attached, on an undertaking to return it on demand, though it is not an official act, the sheriff may claim the bailment to have been made by himself through the medium of his servant, and avail himself of the benefit of the contract. According to the decision referred to, the sheriff, in the present case, might have recognized the act of the plaintiff as done on his behalf, and adopted the contract, and thus have been entitled to sue for a

breach of it; but if he had the right, he certainly was not bound to do this, and unless he has obtained or required a performance of the contract to himself, there can be no objection to the plaintiff's right to maintain an action upon it.

The evidence, that the goods mentioned in the receipt were not actually attached by the plaintiff, nor delivered by him to the defendants, we think was properly rejected. In *Jewett v. Torrey*, 11 Mass. 219, and also in *Lyman v. Lyman*, Id. 317, and *Bridge v. Wyman*, 14 Id. 190, it was held that a receptor can not allege the want of a sufficient and legal attachment, nor of a delivery to him of the goods, after having acknowledged the same in writing, and in consequence of which the officer has made himself responsible for the goods to the creditor. Of the fitness and justice of this doctrine, as well as of its application to the present case, there can be no question. By the memorandum in writing, the defendants acknowledged the receipt of the goods of the plaintiff as having been attached by him on the writs, and promise to deliver them to him on demand; and it appears that the plaintiff returned the goods as attached, and thus made himself accountable for them to the creditors.

Having incurred this liability on the faith of the receipt, the plaintiff is entitled to the benefit of it for his indemnity; and to allow it to be defeated by the defense set up, would be the grossest injustice to him. The instrument offered in evidence to show a release of Jazariah Barrett, one of the receptors, and consequently as a discharge of all of them, was, in our opinion, also properly excluded. It is, no doubt, a well-established principle, that a release to one of several joint contractors operates to discharge the others, because the demand is thereby in law satisfied: Co. Lit. 232, a; 2 Salk. 574; 2 Saund. 48, a. But then it must be a technical release, under seal, in order to have that effect: *Rowley v. Stoddard et al.*, 7 Johns. 207; *Fitch v. Sutton*, 5 East, 232. The instrument offered in evidence in this case was not under seal, nor was it a formal and absolute discharge of Barrett. It was a mere agreement not to proceed against his body or property; and while it was meant that neither his person nor effects should be taken to satisfy the demand, and was so far a discharge of him, it was intended to retain every right and remedy on the receipt necessary to enforce satisfaction from the other contractors. If it could have effect as such, it could certainly amount to nothing more than an agreement not to sue.

Although a covenant not to sue in general inures as a release,

and may be pleaded as such, in order to avoid circuity of action, yet a covenant not to sue within a particular time, or not to sue one of several joint contractors, will not operate as a release. In *Lacy v. Kynaston*, 1 *Ld. Raym.* 690; 12 *Mod.* 552, it is said that if A. and B. be jointly and severally bound to C., and C. covenant with A. not to sue him, that shall not be a release, but a covenant only, because he covenants not to sue A., but does not covenant not to sue B.; for the covenant is not a release in its nature, but only by construction, to avoid circuity of action; for where he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant, and no more. The same principle is laid down in several other cases, and especially in *Dean v. Newhall*, 8 *T. R.* 168. As the agreement entered into by the plaintiff with Barrett could in no view have the effect of a release, it was clearly not available as a defense to the action.

Judgment affirmed.

ISHAM v. EGGLESTON.

[3 VERMONT, 270.]

DELIVERING EXECUTION TO ANOTHER OFFICER.—Where a sheriff receives an execution to levy and return according to law, and without the creditor's consent delivers the same to a deputy, and informs the debtor that the writ is out against him, who, in consequence of the information, avoids the service of the writ, such officer is liable in damages for not serving and returning the writ.

IDEM.—Whether the sheriff performed the service himself, or procured it to be done by another officer, to whom it was directed, would be of no importance; for if performed by any one in the manner required by law, and without prejudice to the plaintiff, it would be a complete answer to the action.

IDEM.—IN AN ACTION AGAINST THE OFFICER for failing to serve and return the writ, the creditor may show, without any allegation to that effect in his declaration, that the execution failed of service, that he has sustained damage by reason of the defendants not retaining the execution in his hands, or in consequence of some act or omission of duty in regard to it, for which he would have been liable if he had retained it.

CASE for the default of the defendant in his office of constable in not executing a writ of execution in favor of the plaintiff. The facts appear from the opinion. Plea, general issue. Verdict for the plaintiff. Defendant filed a bill of exceptions.

Bennet and Aikin, for the defendant.

Isham, contra.

By Court, PRENTISS, J. This action was brought to recover damages for the neglect or default of the defendant in his office of constable of Danby, in not executing or returning a writ of execution, delivered him, in favor of the plaintiff and against William Hitt and Jonathan F. Barrett, of Danby. The defendant, the day after he received the execution, delivered it over to a deputy sheriff, who returned it into the clerk's office in due time, with a return thereon that he had arrested Barrett and committed him to jail, and had made a diligent search, but could find neither the body nor property of Hitt within his precinct. Hitt, at the time the execution was delivered to the defendant, resided in Danby, but had no ostensible property, either real or personal, to satisfy the execution; and Barrett was then confined in jail, and was destitute of property. Proof was admitted on the part of the plaintiff, though objected to, that the defendant, a few days after he had delivered over the execution to the deputy sheriff, gave information to Hitt that the execution had passed through his hands into the hands of the deputy sheriff. The defendant offered, but was not permitted, to show that at the time he delivered over the execution, he assigned reasons for so doing, and what, as the language of the exceptions is, the reasons assigned were; and that the deputy sheriff had used the greatest diligence to arrest the body of Hitt. The questions to be decided in the case arise upon the rejection of the proof thus offered by the defendant; upon the admission of the testimony given on the part of the plaintiff, and objected to by the defendant, and upon the instructions given to the jury, connected with the requests made to the court on the subject by the defendant's counsel.

As the reasons for which the execution was delivered by the defendant over to the deputy sheriff are not stated in the exceptions, it does not appear that the evidence respecting them, which was offered by the defendant, was at all material; and unless it appears affirmatively to have been material it must be taken to have been properly rejected. And the evidence that the deputy sheriff had been diligent in his endeavors to arrest Hitt can not be considered material, so long as it appears from the exceptions that no negligence was imputed to him.

Whether the evidence given on the part of the plaintiff that the defendant communicated to Hitt information that the execution was in the hands of the deputy sheriff was admissible, and whether the court below was bound, in its directions to the jury, to comply with the requests made by the defendant's counsel, are questions involved in, and may be considered as

depending upon, the inquiry, whether the instructions given to the jury were such as the law applicable to the case required. The only request necessary or material to be noticed is that by which the court was called upon to instruct the jury, that if the defendant delivered over the execution to the deputy sheriff before he had opportunity to take the bodies or property of Hitt and Barrett, and the execution was faithfully executed and returned by the deputy sheriff, it was a sufficient defense to the action, whether the execution was returned satisfied or unsatisfied. The court instructed the jury that it might not be a defense without a collection of the debt, or commitment of Hitt to jail; and that if they believed that the fact of the execution being in the hands of the deputy sheriff was communicated by the defendant to Hitt, and that Hitt, by reason of such information, had avoided the deputy sheriff, the plaintiff was entitled to recover such damages as he had sustained in consequence of Hitt's avoidance of the execution, and the failure to arrest his body upon it. These instructions, taken together, were adapted to the facts proved in the case, and show the ground on which the cause was submitted to the jury. The latter clause of the instructions presents the point upon which the cause turned, and on which it must be taken that the jury found in favor of the plaintiff; and if the direction on this point was right, it follows, not only that the evidence on which it was predicated was correctly admitted, but that the instruction which the defendant's counsel requested to be given to the jury was properly refused. It is said that the direction to the jury was wrong, because the defendant had a right to deliver over the execution to the deputy sheriff; and the evidence of his giving information of the fact to Hitt, though it had the effect to enable Hitt to avoid the deputy sheriff, and defeat the execution, would not support this action, which is a general action for not executing and returning the execution, but the matter, if available to the plaintiff, should have been stated specially in his declaration.

It is true that the gist of this action is the neglect or failure to execute the writ of execution in the manner in which it should have been executed, and it is quite immaterial by whom it was executed, provided everything was done which the plaintiff was entitled to have done. Whether the defendant performed the service himself, or procured it to be done by another officer, to whom the execution was directed, would be of no importance; for, if performed by any one in the manner required by law,

and without prejudice to the plaintiff, it would be a complete answer to the action. But when a creditor delivers an execution to a particular officer, and he does not serve and return it, the creditor has a right to bring an action, and declare against him for not serving and returning the execution; and if the officer would excuse himself by showing that he had delivered the execution over to another officer, who had returned it in due time, but unsatisfied, the creditor may show, without any allegation to that effect in his declaration, that the execution failed of service, and he has sustained damage, by reason of the defendant's not retaining the execution in his hands, or in consequence of some act or omission of duty in regard to it, for which he would have been liable if he had retained it. The creditor has a right to look to the officer to whom he has committed the execution, either for the money which may have been collected upon it, or for any damage which may have accrued to him from negligence in the service or return of it; and he is not bound to anticipate, in his declaration, the fact of the execution being delivered over to another officer, with whom he never intrusted it, or the doings of such officer upon it. If this is brought in as a defense to the action, the creditor may show any loss he has sustained in consequence of the execution being thus delivered over to an officer to whom he never gave any authority over it, by way of obviating the defense set up. In the present case, the plaintiff had a right to show that the defendant, after he had delivered the execution over to the deputy sheriff, informed Hitt of the fact; and if the information so given by the defendant to Hitt was the cause of Hitt's avoiding the deputy sheriff, and of the execution being returned *non est inventus* as to him, the plaintiff was entitled to recover, and the jury were properly directed to give such damages as he had sustained in consequence of it.

If the execution had been served upon Hitt as well as Barrett, the plaintiff would have had no ground of complaint; but it was returned without service upon Hitt, and if this was occasioned by the defendant's putting the execution out of his hands into the hands of the deputy sheriff, and giving information of it to Hitt, it was an injury to the plaintiff, for which he ought to have a remedy. Where an officer sends notice to a debtor, against whom he has an execution, to give him an opportunity to avoid him, and then returns *non est inventus*, he is liable for a false return: *Beckford v. Montague*, 2. Esp. Cas. 476. The injury to the creditor is certainly no less where an officer who

has received an execution, without the consent of the creditor, delivers it over to another officer, and then gives information of it to the debtor, who, in consequence of the information, avoids the execution. Such a practice can not be tolerated, and the creditor in such case may recover against the officer, to whom he has delivered the execution, his just damages, in an action for not serving and returning the execution.

Judgment affirmed.

LEAVITT v. METCALF.

[2 VERMONT, 342.]

EXEMPT FROM ATTACHMENT AND EXECUTION are butter made from the debtor's only cow, and a time-piece.

TRESPASS for taking and carrying away one brass time-piece, and one tub of butter of about forty pounds, made from the milk of the plaintiff's only cow. The defendant justified under the levy of an execution. The only question raised was whether the articles were exempt or not. The judge below charged that they were, if the time-piece was the only one in the debtor's house, and if the butter was made from the milk of his last cow. Verdict for the plaintiff. Defendant excepted and moved for a new trial.

Kellogg, for the plaintiff.

By Court, **TURNER, J.** The statute passed in 1797, pp. 208, 209, sec. 1, authorizes the levying of executions upon the property, goods, or chattels of the debtor, "always excepting one cow, and such suitable apparel, bedding, tools, arms, and articles of household furniture as may be necessary for upholding life." In November, 1818, the legislature further exempted from execution, "after the first day of January, 1819, ten sheep, and one year's product of said sheep, either of wool, yarn, or cloth; the best swine, or the meat of said swine; and forage sufficient for the keeping of not exceeding ten sheep and one cow:" Stat. pp. 235, 236. The question depends upon a correct construction of the statute, which must be such as to carry into effect the mind and will of the legislature at the time of passing the act. It is properly a remedial statute, evidently intended to prevent families from being stripped of the last means of support, and left to suffer, or cast as a burden upon the public, and to rescue them from the hands of unfeeling creditors; and the better to enable

such poor debtors to satisfy the just demands against them. The statute must be liberally expounded in favor of humanity. It seems that after passing the act of 1799, under which the property is claimed to be exempt, we find that the legislature extended their humanity still further in favor of poor debtors, by exempting other property, and were more clear and definite in the description of it. The last act assists in the construction of the first, and enables us more fully to ascertain the reason and spirit of it. It is to be presumed that, after the passing of the first act, attempts were made to evade it, which caused the legislature to be more clear and definite in the act of 1818. From 1797 to 1818, we improved much in civilization. As people emerge from a barbarous to a civilized and refined state, they are less cruel towards the unfortunate, and hold out stronger inducements to industry and economy, and are more reluctant to permit the creditor to torture his poor debtor, or wreak his vengeance without a prospect of obtaining his debt. Then what are we to understand by always excepting one cow? Is it not that the family may have a support? We can not presume that they intended the debtor should be at the expense of keeping the cow and for the creditor to have the profits. Hence it must follow that the butter made from said cow must necessarily be within the exceptions. This statute has uniformly received a liberal construction, exempting such household furniture as prudent families were accustomed to have.

It was made to appear on the trial that there had been two decisions exempting the debtor's only time-piece; and notwithstanding this liberal construction of the courts, the legislature still extended the last act much further than the first, which is a strong expression of their approbation of the liberal construction given by the court. It must be admitted that there is a great convenience in a family's having some means of keeping time, even in health, but more especially in sickness. We do not pretend that a time-piece is absolutely necessary for subsistence, and also many other articles that have always been considered exempt under this statute. The word necessary, or necessaries, has ever been considered, in legal language, to extend to things of convenience and comfort, and to things suitable to the situation of the person in society, and is not confined to things absolutely necessary for mere subsistence. An infant may be liable for clothes, which need not necessarily be of a coarse quality, and he may be charged also with the expense of an education as necessaries. A *feme-covert*, in the

absence of her husband, may not only bind him for such things as are absolutely necessary for the support of life, but for articles of comfort and convenience. We are satisfied that a legal and practical construction of the statute will exempt the time-piece from the levy of an execution.

Judgment of county court affirmed.

BARNEY v. BROWN.

[3 VERMONT, 374.]

A SALE OF SHEEP ON THE LAND OF A THIRD PERSON whom the vendee asks to select the sheep from a larger number pasturing on the land, and who does make such selection, and marks those selected with the initials of the vendee, will constitute a good delivery as against creditors of the vendor, although the sheep remain on the land of the third person, the same as before the sale.

TRESPASS. The facts appear from the opinion. The case turned upon the question of delivery of certain sheep, sold to the plaintiff prior to the defendant's attachment. Judgment for the plaintiff, subject to the court's opinion.

Brown, for the defendant, contended that the delivery was not sufficient as to creditors: *Durkes v. Mahony*, 1 Aik. 111; *Mott v. McNeil*, Id. 162.

Fisk, in support of the opposite view, cited 1 Chit. Pl. 3, and the cases there cited; 2 Saund. 47, k; Bull. N. P. 36; 3 P. Wms. 186; 3 Bos. & P. 582.

By Court, PRENTISS, J. The sheep in question were attached by the defendant as the property of Pindergrass, and are claimed by the plaintiff under a previous sale from Pindergrass to him. The plaintiff paid a valuable consideration for the sheep, and the only question is, whether there was such a delivery and change of possession as rendered the sale valid as against the defendant, a creditor of Pindergrass. The sheep, at the time of the sale as well as of the attachment, were in the keeping of Barney, who had undertaken to pasture twenty-two sheep for Pindergrass through the season. The plaintiff purchased eleven of the sheep, and as he lived in a distant town, requested Barney, to whom he gave notice of the purchase, to act for him in selecting the sheep, and to take a delivery of and keep them for him, and he would pay for the keeping. Barney consented to this, and a few days afterwards a selection was

made under the purchase, and the sheep delivered by Pindergrass to Barney, who marked them with the initials of the plaintiff's name, and kept them for him until the attachment.

There can be no doubt, upon these facts, but that everything was done which was necessary to complete the sale, and vest the property of the eleven sheep in the plaintiff. If a vendor of goods in the care and keeping of a third person, directs him to deliver them to the vendee, and the party holding the goods, on notice and application of the vendee, assents to retain the goods for him, it is a sufficient delivery and transfer: *Whitehouse v. Frost*, 12 East, 614; *Lucas v. Dorrien*, 7 Taunt. 278. Barney took the delivery of the eleven sheep as the agent of the plaintiff, and became his bailee, keeping them for his use and at his expense. In all the cases where sales not fraudulent in fact have been adjudged void as against creditors, the vendor continued in the use or possession of the property, and the apparent ownership remained with him. But here, Pindergrass had neither the actual nor constructive possession of the sheep, or in any respect the use, control, or disposition of them. Although before and at time of the attachment, they were kept in the same pasture with other sheep, some of which belonged to Barney and some to Pindergrass, yet as Barney and not Pindergrass had the actual possession of them, it was the duty of the defendant to make inquiry, and ascertain the ownership. To hold the sale in the present case void as to creditors, would be carrying the doctrine respecting the fraudulent sales to an unprecedented extent, far beyond what the policy of the law or the reason of any of the adjudged cases requires.

Judgment affirmed.

AM. DEC. VOL. XIX—46

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA

SALLING v. McKINNEY.

[1 LEWIS, 42.]

FARMING THE OFFICE OF SHERIFF to a deputy, who is to discharge all the duties of the office and receive all the emoluments in consideration of a gross sum paid to the sheriff, is not prohibited in Virginia.

SALE OF AN OFFICE, WHAT IS.—If an officer appoints a deputy who agrees to pay the principal a specific sum, and perform the duties of the office, this is a sale of the office; and a bond for the performance of such an agreement is void. *Per Carr, J.*

CONSTRUCTION OF STATUTES.—The intent of the legislature ought not to be sought for outside of the statute, unless the words are doubtful and uncertain. *Per Carr, J.*

THE OFFICE OF A PROVISIO is not to repeal, but to modify the enacting clause of a statute. *Per Carr, J.* Office of sheriff, history of in Virginia, and of the deputation and sale thereof. *Per Carr, J.*

A PROVISIO in a statute is not to enlarged the operation of the enacting clauses. *Per Green, J., Coalter and Cabell, JJ., concurring.* Farming the office of sheriff, history of in Virginia. *Per Green, J., Coalter and Cabell, JJ., concurring.*

MOTION by McKinney, late high sheriff of Scott county, against Salling, a deputy, for the amount of a judgment which the commonwealth had recovered against McKinney for money collected by Salling and not paid into the treasury. McKinney farmed the two years of his sherievalty to one Gillingwaters, a deputy, for the gross sum of four hundred dollars, the latter to discharge all the duties and receive all the fees of the office, and to save the former harmless. Gillingwaters then farmed out one bailiwick to Salling on a similar contract. He was a sub-deputy of Gillingwaters, but was soon afterwards appointed a

deputy by McKinney, and gave to the latter a bond for the faithful performance of his duties, and conditioned to pay to him all damages he should sustain by reason of Salling's acts. Salling collected part of the public dues and paid them to Gillingwaters, who failed to pay them into the treasury. For the amount of the defalcation, judgment was recovered against McKinney.

Judgment for McKinney. Salling appealed.

Leigh and Johnson, for the appellant.

Stanard, contra.

CARR, J. This case presents the question whether a contract is legal, by which a sheriff contracts that another shall exercise the duties of his office, and have all the fees, privileges, and emoluments of it, and, in consideration thereof, shall pay to the sheriff a gross sum, unconnected in any manner with the fees of the office. This question depends on our statute, which prohibits the sale of any office or deputation of office, etc., touching the administration or execution of justice, or the receipt or payment of the public revenue, or any clerkship in a court of record, subjects the persons offending to penalties and disabilities, and pronounces all such bargains and sales, bonds, covenants, etc., utterly void, etc., provided, that nothing in the act shall be so construed as to prohibit the appointment, qualification, and acting of any deputy clerk or deputy sheriff who shall be employed to assist their principals in the execution of their respective offices: 1 Rev. Code, c. 145, p. 559. This act is taken from 5 and 6 Ed. VI., c. 16, with some difference as to the extent of the law, and also with the exception that the English statute has no such proviso as ours.

That the enacting part of this law extends to the office of sheriff, is most clear, both from its words and the exception in the proviso. This was acknowledged on all hands in the argument. It is settled by many cases that where an office is within this statute, and the salary is certain, if the principal make a deputation, reserving a less sum out of the salary, it is good; so if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good; for in these cases the deputy is not to pay unless the profits arise to so much; and though a deputy, by his constitution, is in place of his principal, yet he has no right to his fees; they still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and

giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, which must be paid at all events, this is a sale of the office; and a bond for the performance of such an agreement is void by the statute. This construction of the law, settled by numerous English cases, *Sir Arthur Ingram's case*, Co. Lit. 234 a.; *Doct. Trevor's case*, Cro. Jac. 269; 12 Co. Rep. 78; *Woodward v. Foze*, 3 Lev. 289; 2 Vent. 187; 3 Inst. 148; *Layng v. Paine*, Willes' Rep. 571; *Parsons v. Thompson*, 1 H. Bl. 322; *Garforth v. Fearon*, Id. 327; *Law v. Law*, Cas. Temp. Talb. 140; 3 P. Wms. 391, S. C.; *Harrington v. Du Chatel*, 1 Bro. C. C. 124, has also been adopted by this court in *Noel v. Fisher*, 3 Call, 215, a case which arose before our law, and was decided under 5 and 6 Ed. VI., c. 16, then in force here.

It being thus settled that the office of sheriff is within the enacting part of this law, and that a deputation for a sum in gross is a sale of the office, and void, the case at bar must be clearly within the statute, unless the proviso can receive such a construction, as to repeal the enacting clause wholly, so far as relates to the deputation of the offices of sheriff and clerk. It is contended, that this construction must be given to it; and the tenor of the reasoning on which this idea rests is (if I understand it) the following: The proviso must be intended to have some effect, to withdraw from the operation of the law some case or class of cases, which would otherwise be within it. Literally, it imports that nothing in the act shall be taken to prohibit the appointment of a deputy clerk and sheriff, to assist their principals in the execution of their offices; but there was nothing in the act which did prohibit this; and, therefore, there is no function for the proviso taken in the limited sense. We must then enlarge its meaning, till it reach some enactment of the law; as it stands, taken literally, it would make the act read thus: No sheriff shall sell the deputation of his office, provided, however, that this shall not be so construed as to prohibit a deputation made without a sale. To avoid this absurdity, where the proviso says, that nothing in the act shall prohibit the appointment, qualification, and acting of a deputy clerk or sheriff, we must construe it to mean, that nothing in the act shall prohibit the sale of the deputation of clerk or sheriff.

To this reasoning I can not assent. There seem to me several insurmountable objections to it. In the construction of statutes, we are told from high authority, that "when the words are doubtful and uncertain, it is proper to inquire what

was the intent of the legislature; but where they have expressed themselves in plain and clear words, it is very dangerous for judges to launch out too far in searching into their intent." In the enacting clause, the statute prohibits, in the strongest and clearest terms, the sale of certain offices, and deputations of offices; among these the office of clerk is expressly named, and that of sheriff so described that the law embraces it just as clearly as if it had been named. The proviso says, that nothing in the act shall prohibit the appointment, qualification, and acting of any deputy clerk or deputy sheriff. How can we understand the appointment, qualification, and acting of deputy clerks and sheriffs, to mean the sale of the deputation of these offices? Does appointment mean sale? Can there be no appointment but by a sale? When the law uses words of known and settled meaning, we must give them that meaning. The word appointment is one of frequent use and determinate meaning, in the law; many statutes regulate the appointment of deputies (sheriffs, clerks, surveyors and others); and I fancy it would puzzle the research of the most indefatigable, to produce a single instance in which the word is used to signify a sale. When the act meant to forbid the sale of offices, it used plain terms, "no person shall bargain or sell any office," etc. If it had intended in the proviso to except from the operation of the act the sale of the deputations of clerk and sheriff, was it not natural to have used the same terms, and to have said, "nothing in this act shall be construed to prohibit the bargain or sale of the deputations of clerk or sheriff?"

This construction not only violates the plain language of the law, but the nature of a proviso also; the office of which is not to repeal the enacting clause, but to modify it. The legislature is not to be supposed to intend to contradict, in the latter clause of a law, what they had enacted in a former; but to limit and explain the general words of the enactment. And this explanation is often out of abundant caution, excepting from the operation of the law, expressly, cases which by fair construction would not have come within its range. But here you make the law say, "no sheriff or clerk shall sell the deputation of his office; provided, nevertheless, that nothing in this act shall be so construed as to prohibit a sheriff or clerk from selling the deputation of his office." If the legislature had used these words, the courts could not have helped it; but is it right to make them speak thus, by a construction which violates the palpable meaning of the words it has used; and this, on the

ground, solely, that the proviso will be inefficient, unless you give it this extent?

But if we must look for the intent of the legislature, what was the general object of this law? It is entitled: "An act against the buying and selling of offices." The preamble to the English statute, from which ours is taken, states the objects to be, to avoid corruption, etc., and to the intent, that persons worthy and meet to be advanced to the place where justice is to be administered, or any service of trust executed, shall hereafter be preferred to the same, and no other, etc. In *Layng v. Paine*, Chief Justice Willis, in delivering the opinion of the court, says, there were two principal reasons for making that statute: 1. That offices might be exercised by persons of skill and integrity; and, 2. That they might take only the legal fees; for, he adds, "those who buy their offices, will be apt to make more than their legal fees, according to what is said in 3 Inst. 148, they that buy will sell." Now, are not the offices of clerk and sheriff within the mischief and the reason of this statute, as well as the letter? Is it not important to the community, that these offices should be exercised by persons of skill and integrity? Do they not furnish the greatest facilities, and the strongest temptations, to imposition and extortion? What officer is there, so closely and intimately connected with the people, in all their civil relations, as the sheriff? In the collection of taxes, the service of process, the levying of executions, the sale of property, and in various other ways he has it in his power to harass and oppress them, by means so easy of practice, so difficult of detection, as to offer the strongest possible temptations; so strong, indeed, that none but the firmest and most upright minds can be expected to resist them; for the judicious selection of this officer, the law has shown itself very solicitous, however its provisions may have been neglected or perverted in practice.

The justices of the peace, we know, are appointed for their good character, and form a most respectable class of the community; out of this body, the court of every county is directed, annually, to nominate to the governor three persons, one of whom, being approved by the governor, with the advice of the privy council, shall be commissioned to execute the office of sheriff. What greater caution could the legislature have observed to insure the filling this office by men of skill and honesty? And can we suppose that this same legislature intended, that so soon as the sheriff was appointed, he should set up his office for sale to the highest bidder? That, when passing a law, pro-

hibiting, under severe penalties, the sale of offices which in any wise touch the administration or execution of justice, or the receipt or payment of the public revenue, they should, by a proviso, mean to say, nothing in this act shall prevent a sheriff from selling his office to a deputy? And that, too, when the law only says, nothing shall prevent his appointing a deputy to assist him? What is the natural effect of this license to sell? The sheriff considers the office as a source of profit merely; as something given him to make money by; and the more he can make by it, the better. He sets it up for sale. When a bidder offers, what are the considerations which influence him? Does he ask, which among all these will administer the office with most skill and integrity, with least oppression, extortion, and vexation to the people? By no means; but, which will give me the highest price, and best secure me against the consequences of his misdeeds, should they be discovered? Having secured these points, he makes over his office, and divests himself, so far as he can, of all its duties and its cares.

What is the view of the buyer? Not, assuredly, to benefit the people, but to better his own condition; to make money. He has probably been screwed up, by competition, to a high price, and is turned loose upon the people, not merely to indemnify himself (for no man will work for nothing), but to make the most of his bargain; and, having bought for gain an office presenting so many tempting opportunities for extortion and speculation, who can wonder that he should seek to improve them to the utmost? And thus would be violated the second great object of the statute against buying and selling of offices, which Chief Justice Willis states to be, that the legal fees only should be taken; for those who buy their offices will be apt to make more than their legal fees, according to what is said in 3 Inst.: "Those that buy will sell." Thus, whether we consult the plain language of the law, or the intention of the legislature, it is equally clear to me, that the sale of the deputation of the offices of clerk and sheriff, so far from being sanctioned and legalized, is expressly prohibited.

It is said, that while the enacting clause prohibits the sale of the offices of clerk and sheriff, the proviso only permits the sale of the deputation of those offices, and therefore modifies, rather than contradicts, the clause. But does not the clause forbid the sale of the deputation, as well as of the office itself? If you permit a sheriff to sell out his office to any one whom he shall make his deputy, I should like to know what kind of a

sale of his office it is that you prohibit? or of what practical use such prohibition can be?

It was also contended that the history of sheriffs, traced from the earliest annals of the state, adds strength to the opinion that the proviso intended to legalize a sale of the deputation of the office, by showing that this office was intended to pass in rotation through the magistracy of the counties, as a reward for their various services, which would be frustrated unless they could farm their offices out; as it was well known that both from their age, when the office usually came to them, and from their personal unfitness in many cases, they could neither execute the office themselves nor superintend its execution. And for these positions the laws of the colonial government and of the state, and the practice under them, were referred to. Let us first look to the laws. I deny that by them the office was either directed to pass in rotation, except for a short time, or given as a reward. There is in 1 Hen. Stat. at large, p. 224, an extract taken from a manuscript book, stating that in 1634 the country was divided into eight shires, etc. And it is added, "and, as in England, sheriffs shall be elected to have the same power as there." This is the first notice of sheriffs in our laws. In the same volume, p. 392 (anno 1655), it is enacted, "that the commissioners (justices) of every county shall recommend three or more to the governor and council, who shall elect such sheriffs, out of those so recommended, as they, etc., shall think most meet and fit for the place." The first act I can find, confining the office of sheriff to justices (then called commissioners) is in 1660-1, 2 Hen. Stat. at large, p. 21, and the second is 1661-2, Id. p. 78. And the reason assigned for it in the last act is worthy of notice: "Forasmuch as the commissioners of county courts are, by the laws of this county, answerable for the levies and estreatments of each county, of which the sheriff is usually collector, be it therefore enacted, that none but one of the commissioners of each county shall be sheriff of the county; and, further, that the commissioners shall exercise the said office, successively as they hold their places in commission, every one a whole year and no longer."

Here two things are remarkable: 1. The office was not confined to the magistracy by way of reward. 2. They were to take it in succession. This act seems to have remained in force till 1705 (3 Hen. Stat. at large, p. 246), when a law passed, enacting (among other things) that the court of every county shall yearly present to the governor a list or recommendation of three

such persons (being justices) in the same county court, respectively, as they shall think most fit and able to execute the office of sheriff, etc. Here we find the principle of the office passing in rotation among the justices expressly repealed, and the courts directed to recommend to the governor three such persons, being justices, as they shall think most fit and able to execute the office of sheriff. And this principle of rotation, thus expressly repealed, has not been revived, nor has it received the least countenance from any succeeding law. On the contrary, from the passage of the above law to the year 1748, upwards of forty years, the principle of selecting persons for their fitness and ability remained express law, and has, in my opinion, given the rule which ought to have governed ever since. For though the law of 1748 (which has been followed in all the subsequent revisions) says, the justices shall annually present to the governor a list of three persons of their body (omitting the words, "such persons as they shall think most fit and able"); yet, as the principle of rotation had been expressly repealed, I can not see what rule ought to have guided their selection, but the superior fitness and ability of the persons chosen; and this, more especially, if it should appear that the office of sheriff was not given to the justices of their benefit, or as a reward for their services.

This, I think, does appear: 1. From the law before quoted, which assigns a different reason for confining the office to the justices; and, 2. From the consideration, that in that early day, when the counties were thinly inhabited and poor, the office was rather a burden than a benefit; a conclusion greatly strengthened by the fact that in 1710 the legislature found itself obliged to compel the acceptance of the office, by inflicting the heavy penalty of five thousand pounds of tobacco on any person commissioned who should refuse to act; unless such person should make oath, before the court of the county, that he hath used his best endeavor, truly and *bona fide*, without any covin or collusion, to get security for his performance thereof and that he could not obtain such security. It is further provided by the act, that no person who hath served as sheriff of a county shall be liable to the forfeitures of the act, for refusing to serve a second time, unless every person named in the commission of the peace hath actually after him served in the office of sheriff, or paid the fine for refusal. This act continued in force, I believe, till the revisal of 1792, the penalty being reduced from time to time. Now, I ask, can better evidence be wanting to show that, at the passage of this law, the office was

a burden rather than a benefit? Do we find it necessary to compel by penalties the acceptance of favors, benefits, or rewards? To make a man purge himself, by oath in open court, of the suspicion of attempting to evade the acceptance and enjoyment of these rewards, by covin and collusion? If the office had been profitable, would we have seen a proviso exempting a man who had served once, from forfeiture for refusing a second service, unless every other justice had also borne the burden since his service?

These considerations satisfy me, that when the law passed confining the office to the justice, it was a thing rather to be avoided than sought after, and not given to them as a reward for services, but imposed upon them as a burden. That in the lapse of years, and the progress of society, the office has become valuable, can certainly have no effect upon the original intention of the legislature.

That the practice, since my day at least, has been to appoint the justices to the office in rotation, I admit; how far back it commenced, I know not. As a commentary on the law, it would have weight in a doubtful case, but where the law is clear it must speak for itself. It was also contended that though the sale of the sheriff's office be not permitted by law, yet it has been the general idea that it was so, and the universal practice to farm it out; and that this common error makes it lawful. I can not assent to this position. The sale of the deputation of this office is expressly forbidden by the statute, unless the proviso excepts it. I have shown it does not. Here, then, we have the statute law prohibiting the sale under a severe penalty, and declaring the bond given as the price of it void; and we have the law of common error, holding the sale and the bond good. Which shall we follow? We can not serve two masters.

To me it seems that we can know no law but that derived from the law-making power; and that, in opposition to such laws, error, however common, however hoary, can impose on us no obligation. We ought, in such cases, to examine the law thoroughly, and see clearly that the common opinion is erroneous before we decide; but, having done this, and finding that we must either violate the law or correct the error, I can not conceive how we should hesitate in our course. And this, I think, has been the opinion of this court. No error could be more prevalent than that one bond would answer for the two years of the sheriff's office; but this court did not, therefore,

shrink from correcting it. It was equally the general opinion that you might fine a sheriff, *toties quoties*, for failing to return an execution; and this was the constant practice; the question, however, at length came before this court, and the error was corrected.

It was said, in the argument of the case of *Wernick and McMurdo*, also, that the opinion and practice were old and general, that an administrator *de bonis non* could sue the representative of a former executor for assets wasted or converted by him; this court, however, took up the question upon the law, not of public opinion, but of the land, and decided that he could not. Other cases, I have no doubt, might be mentioned.

It was also said, that if we decide that a deputation of the office of sheriff for a sum in gross is a sale, it will have no other effect than to add four words to the bargain, and make the price payable out of the profits. What consequences may follow our decision, is not, as I conceive, the exact question before us. That question is, whether by such deputation for a gross sum the law is violated which forbids a sale? If it be, we must say so, though the heavens should fall. That such deputation is a sale, was admitted as settled law; and the cases proving it are too numerous to cite. The law, then, pronounces the contract void, and all bonds given under it. If this law may be easily evaded, that can be no reason for our refusing to execute it, though a proper ground for amendment by the legislature.

Upon the whole, I think both bonds, that of the deputy and of the sub-deputy, void; and that the motion being on them, can not be sustained; and, therefore, that the judgment of the court below should be reversed.

GREEN, J. This case presents the question, whether the respective contracts between McKinney and Gillingwaters, and the latter and Salling, were void under our statute prohibiting the buying and selling of offices. That statute relates to all such offices, or the deputations of them, or of any part of them, as in any wise touch or concern the administration of the executive government, or the administration or execution of justice, or the receipt or payment of the public revenue, or any clerkship in a court of record; and prohibits all persons to bargain or sell the same, or to receive or take anything directly or indirectly for the same, or for a vote in appointing thereto, or to take any promise, agreement, etc., for the payment of anything

for the same, or for a vote in appointing thereto, under the penalty of being incapable of appointing, or voting for the appointment, to any such office or deputation thereof, or of any part thereof, and of being disabled to hold the office in virtue of which they hold the right to appoint, or to vote in the appointment to the same, and of being amerced and imprisoned; and if a member of the assembly, of being expelled and incapable of being afterwards elected. And every person giving or paying, or making a promise, agreement, etc., to give or pay anything for the appointment, or for a vote in the appointment, to any such office or deputation thereof, or of any part thereof, is declared incapable of serving in any such office. It moreover declares, that every such bargain, sale, promise, agreement, etc., shall be void, with two provisos: 1. That nothing therein contained shall be so construed as to prohibit the appointment, qualification, and acting of any deputy clerk or deputy sheriff who shall be employed to assist their principals in the execution of their respective offices; 2. That all acts done by any person so offending, by authority or color of the office or deputation thereof which ought to be forfeited, before he be removed from the office or deputation, shall be valid in such like manner as if the act had never been made.

This statute was taken literally from that of the 5 and 6 Edw. VI., c. 16, with the exception of the proviso in our act in respect to deputy clerks and sheriffs, and of offices touching the administration of the executive government, which are not in the English statute, and of many offices embraced in that which are not touched by our act, none such existing here. The settled construction of the English statute is, that whenever the agreement is that the deputy shall do all the duties and receive all the emoluments of an office, the profits of which are uncertain and depending upon fees, and shall, in consideration thereof, pay, or agree to pay, a gross sum to the principal, it is a sale prohibited by the statute. But if he only engages to pay a stipulated sum, out of the fees, it does not fall within it. And this was the construction adopted by this court in the case of a sale of the deputation of the office of sheriff, in *Noel v. Fisher*, 3 Call, 215, a case which arose upon a transaction before our statute was enacted, and when the English statute was in force here.

There can be no doubt but that the enacting part of the statute extends to the office of sheriff, which emphatically touches and concerns the execution of justice and the receipt and payment of the public revenue. The only question is, whether

the deputation of that office is wholly excepted out of the enacting clauses by the proviso. The literal terms of the proviso import, that only the case of a deputy employed to assist the principal in the execution of his office, and not one employed to do the whole of its duties, is intended to be excepted from the operation of the enacting clauses. Yet, if the proviso was expunged from the act, the employment of a deputy to do the whole of the duties would not be prohibited. And it is contrary to the nature of a proviso to enlarge the operation of the enacting clauses. To employ a deputy to do the whole business of the office, paying him a fixed sum, or giving him all its emoluments (except a given sum to be paid by him out of them), as a compensation for his services, would, therefore, be the employment of a deputy to assist his principal, within the meaning of the proviso. But there was no occasion for any proviso to except such a case from the enacting clauses, since, without the proviso, the case would not fall within the prohibitions of the statute. The only case in which a deputation of the office could come within the enacting clause, is that where the deputy paid, or agreed to pay for it, a gross sum, at all events, and independently of the amount of the fees; and if the proviso does not except such a case, it has no effect whatever. For, in that case, the statute would, in respect to the deputation of the office of sheriff, read, in effect, thus: No sheriff shall sell the deputation of his office; provided, however, that this shall not be so construed as to prohibit a deputation made without a sale; which would be absurd, unless there were some doubt whether the office could be deputed or not, and the proviso was inserted for greater caution, and to sanction deputations which were not contrary to the enacting clause. But there was no shadow of doubt upon that point; for the office of deputy sheriff had been recognized by our statutes, and regulated from the earliest periods of our legislation; and so the office of deputy clerk was also recognized, and only a few years before an oath prescribed to be taken by him, before he could be permitted to act as such.

It was argued that the offices of clerk and sheriff, and deputations of them, being embraced within the enacting clause, especially that of the former, which is mentioned by name, a construction which would exempt the deputations of them from the operation of the statute, would give to the proviso, not the effect of modifying the general provisions of the enacting clause, but of taking from its operation entirely one of the cases at least which was embraced by it in express terms, that of the

office of clerk of a court of record. A particular attention to the frame of the act, which follows literally that of the English statute, in which there is a proviso excepting certain offices, will show that such would not be the effect of that construction. It begins with prohibiting the sale of any office or offices, or the deputation of any office or offices, or any part or parcel of any of them, or the receiving money, etc., for any office or offices, or the deputation of any office or offices, or of any part or parcel of any of them, or for a vote in appointing to any office or offices, or the deputation of any office or offices, or any part or parcel of them; and then describes the offices as being those only which shall in any wise touch, etc. The general object of the act being to prohibit the sale, not only of offices of a particular description, but the deputation thereof, or of any part thereof, with only two exceptions, not of the offices, but of their deputations only, the most simple method was to announce, in the first instance, a general prohibition, and then the particular exceptions, not of any office particularly designated in the several prohibitions, but of its deputation only. Thus, notwithstanding the proviso, the offices of clerk and sheriff may be sold contrary to the statute, or at least a vote in the appointment of them may be so sold; as, if any justice of the peace should receive a reward for giving his vote in the appointment of a clerk, or the nomination of a sheriff, or any judge for the appointment, or a vote in the appointment of any clerk, or a member of the executive, for a vote in the appointment of a sheriff. These cases would fall clearly within the denunciations of the statutes. These considerations would incline me strongly to the opinion, if we were not to look beyond the terms of the statute itself, that the sale of the deputation of the offices of clerk and sheriff was not embraced by the statute. Other circumstances lead to the same conclusion.

One of these is to be found in the history of the office of sheriff in Virginia. Until 1655, sheriffs were elected. An act was then passed, directing that the justices of the peace in each county (then called commissioners) should nominate three or more, out of which the governor and council should commission one as sheriff. In 1660, it was enacted that the office should be conferred upon the commissioners in succession. And so the case remained until 1705, when it was enacted that no person but a justice of the peace should be appointed sheriff, and that the county courts should annually nominate three justices, one of whom should be commissioned; and that a sheriff might

be continued for two years, and no longer, the former laws, from 1657 downwards, having prohibited any sheriff or under-sheriff, to serve for more than one year. In 1710, a heavy penalty was imposed upon any one who was commissioned, and refused to act. This penalty was, from time to time, gradually moderated, and finally dropped at the revisal of 1792.

Although the laws, subsequent to 1705, imposed upon the county court and executive no obligation to nominate and appoint the justices in succession to the office of sheriff, yet the invariable practice has always been, and still is, to pursue the course (which is considered as a matter of right), unless there be some very serious objection to the propriety of appointing the senior justice who has not already held the office. The office, although formerly burdensome, and imposed upon the justices under a heavy penalty, has long since been of some value, and considered as a reward, and the only one given to them for their important public services. These justices have been uniformly selected from the most valuable and respectable classes of our community, have borne the chief burden of the administration of justice, and the whole of that of the internal police of the country. They have, in a great degree, composed our legislative bodies. The office of sheriff, devolving on them in succession, generally comes to them at an advanced age, and when they are unfitted, from that cause as well as from their previous course of life, and other occupations, to discharge in detail the duties of the office, or even to superintend personally the discharge of those duties by others; and they have, as was to be expected, almost invariably, so far as I am informed, and as indeed is perfectly notorious, farmed their offices to others, without being conscious of violating any law, either municipal or moral. This practice must have been well known to the legislature which enacted the law in question. And this induces the belief that the proviso was intended to except the deputation of this office from the general terms of the statute. In a doubtful case, the state of things to which the provisions of a statute were intended to be applied, may properly be resorted to as a means of ascertaining the true construction.

Another circumstance, entitled to some weight, is that the statutes of 4 Hen. IV., c. 5, and 26 Hen. VI., c. 10, which expressly prohibited a sheriff to farm (that is, to sell the deputation of his office), were in force here when the legislature were engaged in the business of re-enacting such of the British statutes as it was thought fit to adopt into our code as preparatory

to the abolition of all the English statutes. And though the statute of Edw. VI. was in substance enacted here, and all our own statutes, respecting the office and duties of sheriff, were also revised and brought into one; yet it was not thought fit to adopt the prohibition of the statutes of Hen. IV. and Hen. VI., of farming the office of sheriff. On the contrary, in re-enacting the statute of Edw. VI., which, whilst it would have prohibited the farming, but not the deputation without sale, of the office, if the proviso in question had not been inserted, they inserted that proviso for no purpose that I can perceive, but to prevent the operation which the statute would otherwise have had in prohibiting the farming of the office.

If, however, these circumstances are not sufficient to justify the conclusion that, upon the literal construction of the statute, the sale of the deputation of the office of sheriff is excepted from its provisions; still, the construction is so doubtful, and the practice in question has so long prevailed, and is so extensive, and the consequences of holding it illegal so extensively ruinous, that if there be any case to which the maxim *communis error facit jus* can apply, this is surely one. That maxim has been held in England to sanction practices even expressly against the statutes: *Clay v. Sudgrave*, 1 Salk. 33; *Walton v. Spark*, Comb. 321; *Herbert v. Binion*, Roll. 223; *East India Company v. Skinner*, Comb. 342. If this practice were held to be illegal, and the original contract of deputation held to be void, all collateral contracts of indemnity, or otherwise founded on it, as their consideration, would also be void, and the parties subjected to the high penalties imposed by the law; and, in both respects, very great numbers of persons would be involved, while such a decision would have no effect whatever in preventing the future mischief which might arise from the practice; since it would only serve to admonish the parties of the necessity of adding to the terms of their contracts four words (out of the profits), which would not vary the substance of the contract, while it would make it unquestionably valid.

If I am right in these views, the argument, that the sale of public offices is *malum in se*, and against the principles of the common law, and amount to bribery and extortion, is sufficiently answered. Upon the whole, I think the contract between McKinney and Gillingwaters was valid; and that between the latter and Salling, whether valid or void, can in no way affect McKinney, since he was not privy to it. All that we can infer from the facts in the record, is, that McKinney having sold the deputa-

tion of his whole office to Gillingwaters, the latter substituted Salling to a part of it, and McKinney, at his instance, admitted the latter as his deputy; he giving surety to McKinney, to indemnify him against any loss arising from his acts as deputy, and not to Gillingwaters to indemnify him. Salling was therefore bound to see that the revenue collected by him was paid into the treasury, so as to indemnify the high sheriff, and paid it over to Gillingwaters at his own peril.

The judgment should be affirmed.

COALTER, J., and CARELL, J. concurred.

BROOKE, President. I do not think it of any importance to inquire into the history of the shrievalty in Virginia, or to ascertain from it, when and whether it was a valuable office, or in what degree it was intended as compensation to the magistrates of the counties; as very little if any light is to be borrowed from those topics, to illustrate the construction of our statute against buying and selling offices, passed in 1792, and which (with the exception of the fourth section) is a copy of the 5 and 6 Edw. VI., then in force here. That it was the practice to sell the deputation of the office of sheriff, either for a gross sum, or a sum to be paid out of the fees of the office, at the time the act of 1792 was passed, there can be no doubt. The first section of that act disables the persons holding the offices therein described, from holding them, who shall bargain or sell any office or offices, or receive or take any money, fee, or reward, or any profit, directly or indirectly, or take any promise, agreement, covenant, bond, or assurance, for any office or offices, or the deputation of any office or offices, or any part or parcel of those which shall in any wise touch or concern the administration of the executive government, or the administration or execution of justice, or the receipt or payment of the public revenue, by declaring, in the latter part of the section, that every person so offending shall be incapable of appointing or voting for the appointment to such office, and shall be adjudged a disabled person in law, etc., plainly, and in terms, including and interdicting the deputation of, or appointing to, the office of deputy sheriff, among others, for any fee or reward, etc. The second section, corresponding with the first, disqualifies the person receiving the deputation or appointment of such offices, on the terms interdicted in the first section, from holding or serving in such offices. And the third section declares that such bargain, sale, promise, bond, covenant, agreement, or assurance

(referring to all those interdicted in the first section), shall be utterly void and of no effect. And then comes the proviso in the fourth section, on the construction of which the case before us depends; it is, that nothing in the act contained shall be so construed as to prohibit the appointment, qualification, and acting of any deputy clerk, or deputy sheriff, who shall be employed to assist their principals in the execution of their respective offices. To give to this section no effect at all, would be a monstrous construction of the act.

Though it is admitted that examples may be found in some of our statutes, in which the legislature, for greater caution, have, by a proviso, excepted a case not before in the act; yet no example can be found in which a case plainly within the terms of the statute has been held to be unaffected by a proviso, obviously (as in this instance) intended to take it out of the act, upon any construction of the act founded on its policy, and not on the terms of the proviso. Such an example would justify the court, in almost any case, in departing from the plain letter of a statute, and giving to it a construction drawn from what it might suppose a wiser and better policy.

The first section of the act plainly interdicts the buying and selling a large description of offices, including that of deputy sheriff; an office which, it must be admitted, it was the practice to sell, under the existing restrictions upon the abuse of the power, not altogether applicable to other offices, viz., the control of the law, which requires an oath to be taken by the deputy sheriff in open court, and of the court also, which might, for good reasons, object to his qualification. And to except this office from its operation, and also that of deputy clerk, was not so violent an outrage on the whole policy of the first section as seems to be supposed. To insist that the proviso means only to except the sale of such office for a sum to be paid out of its fees, would be to give it no effect, as such sale was not within the first section of the act. It was known to the legislature, when the act was passed, to have been so decided by the English judges on the statute 5 and 6 Edw. VI., from which it copied the section.

But the proviso, in its terms, is not susceptible of such an ineffectual construction of its meaning; in it is employed the very language of the first section. It is not to be so construed as to except the naked appointment, etc., of any deputy clerk or deputy sheriff, no appointment of either being prohibited by the first section (but, on the contrary, indirectly provided for), unless made for fee, reward, etc. In terms, too, the proviso applies to

the third section, which makes void all bargains, sales, etc. Its terms are, that nothing in this act contained (including all its sections) shall be so construed, etc.; plainly, I think, excepting from the act the operation of the third section, also, on bargains, sales, etc., entered into for the office of deputy sheriff. The decision in the case of *Noel v. Fisher*, in this court, if it can have any influence, is favorable to this construction of our act. That decision was on the English statute, from which the three first sections in our statute are substantially copied. It was in a case arising before the passage of our act of 1792. It pronounced a bond taken for the office of deputy sheriff for a gross sum (not to be paid out of the fees of the office), to be void, as the English courts have before done, on the statute of Edw. VI. And it can hardly be doubted, that though that decision was after our statute upon a case arising before it, the law of it was well known to the legislature, from the English decisions long before; and it is not conceivable that in the fourth section of our act (the proviso) it meant to take a case out of the operation of it which had never been considered as within the act of Edw. VI., but the contrary, by the English judges. I think such a construction inadmissible on every ground, and that the case before us is within the proviso, and that therefore the judgment must be affirmed.

Judgment affirmed.

NEWSUM v. NEWSUM.

[1 LEIGH, 86.]

AN ADMINISTRATOR SELLING THE CHATTEL OF ANOTHER, as part of his intestate's estate, and applying the proceeds in payment of the debts of the estate, without notice of the rights of the true owner, is personally liable in trover by such owner.

PROOF OF DEMAND AND REFUSAL in trover is not necessary where there has been an actual conversion.

WHETHER A NAKED TRUSTEE OF A CHATTEL can recover full damages in trover, *quære*.

OF EXCEPTIONS TO THE OPINIONS OF THE COURT, taken at the trial on specific points, the appellate court will consider such points only as were presented to and decided by the court below, though, from the exceptions, it may appear that other points might have been made.

TROVER brought by William Newsum against Henry Newsum. Plea, the general issue. R. B. Keeling, being possessed of a slave, the subject-matter of this action, conveyed the same, in connection with his wife, Amey Keeling, to the plaintiff, in trust

for the use of Amey, and, after her death, for the use of her children. Amey, in her life-time, sold the slave to one Pendred, who dying, his widow took out administration, and subsequently married this defendant. The latter, in his representative character, sold the slave and applied the proceeds to the payment of the debts of his intestate. The defendant offered to prove that the estate was largely indebted to him, but the evidence was rejected. Whence an exception was taken. Exceptions were also taken to the rulings of the court, that if there had been an actual conversion, no demand and refusal need be proved; and that the fact of the defendant's having acquired the slave in a representative capacity did not alter his liability. A *supersedeas* was allowed by this court.

Stanard, for the plaintiff in error.

Conway Robinson, for the defendant in error.

CARE, J. The exceptions taken to the opinions of the court given at the trial, present the only points for the consideration of this court. The ingenuity of counsel, indeed, suggested several others, but we are compelled by the settled law of the court to say that they do not arise upon this record. The distinction between a bill of exceptions and a demurrer to evidence, has been so often taken by this court, that it would be a waste of time to repeat it, and most mischievous to depart from it. This distinction clearly excludes from our view the question made upon the act of limitations, whether the five years of possession ought to run from the sale of the slave by Mrs. Keeling, or from her death. It is not upon the record, and *non constat* what was the evidence. Neither can we, sitting in a court of law, take cognizance of the equitable rights of the children of Mrs. Keeling; that consideration is for another forum. Nor, as it seems to me, does it come fairly before us on this record, to decide whether a trustee can bring trover for a slave; or, whether his damages should be for the full value, or nominal merely. The plaintiff sues, not as trustee, but as owner of the slave; the jury has found a general verdict, and the evidence is not before us. True, in a bill of exceptions taken by the defendant, to a refusal of the court to instruct the jury (not that a trustee could not maintain trover for a slave, but "that unless a demand and refusal was proved, the verdict must be for the defendant"), there is a statement of some evidence, and, among other things, a deed of trust, which, it is said, conveyed the slave to the plaintiff; but what other evidence might have been before the jury it

is impossible to say. If, however, these questions were properly raised, I should feel no hesitation in saying that a court of law looks only to the legal title, and that being in the trustee, he may assert it by any action which is given to the legal owner of property; nor can a court of law limit his recovery to nominal damages.

As to the instructions of the court, they seem to me entirely correct. Demand and refusal is only evidence of conversion, and therefore not necessary under the facts of this case, where a conversion is proved by other evidence. In like manner, the defendant was liable to the action, though he received the slave as administrator, sold him as administrator, and disbursed the money as administrator, without the least notice of the defect of his intestate's title. The right of the owner to sue for his slave can never depend on such circumstances as these. The administrator, when he sells property as belonging to his intestate, acts at his peril. If he sells my property, he must answer to me for it, however he may have thought himself bound by law to sell, and however fairly he may have applied the proceeds of the debts of his intestate. The court was also right in rejecting the evidence offered by the defendant. What had the inventory, appraisement, and settlement of his administration, account to do with the claim of the plaintiff? They were wholly irrelevant to the question whether the slave was the property of the plaintiff or not. I think the judgment must be affirmed.

GREEN and CABELL, JJ., and BROOKE, President, declared their entire concurrence with the opinion of Judge Carr; but

COALTER, J., said he was not prepared to say, as a general proposition, that where a testator or intestate has fairly purchased property, a horse for instance, from one who turns out afterwards not to be the true owner, and dies possessed of such property, having for a considerable time used it as his own, and it comes to the possession of his executor or administrator after his death, and he, without any notice or demand from the true owner, sells the horse, with the other perishable estate, and fully administers the whole personal fund, if in such case trover be brought against the representative for a conversion by him as an individual, the action can be sustained so as to throw the loss on him. He added: I understand the law to be that if a defendant come to possession of a chattel by finding, or in other lawful way, it is necessary for the plaintiff to prove a refusal to deliver, unless the defendant shall have unlaw-

fully intermeddled with the goods. If they be lost or taken from him, he is not guilty of a conversion, because he has not disposed of them as if they were his own.

Does the executor or administrator, as an individual, unlawfully intermeddle with the goods in the case put? Can he be said to have converted them to his own use? Is it an answer to this to say that he has converted them to the use of the estate? It will, no doubt, be a conversion in the testator or intestate, in the case put, for which, under the act of assembly, trover will lie against the executor or administrator, and may be a conversion by him as executor or administrator, and for which trover may lie against him as such, so as to charge the estate for the value; or an action for money had and received by the executor or administrator as such, so as to charge the estate; but the question is, whether, under our system of laws, in relation to executors and administrators, and especially since the party is not without his just remedy under the act giving trover against executors and administrators, as well as for them, he can be charged individually, as for a conversion to his own use, unless demand and refusal, before he has sold, be proved. When the goods come to the hands of the executor or administrator, the regular remedy is replevin or detinue for them: 1 Wms. Saund. 216 a, note 1. The law makes it his duty to sell; he can not resist the claims of creditors; he can not demand, as to them, that the personal estate shall remain five years in his possession, so as to put to rest all demands of this kind; he can not resort back to creditors, since he can not show who has received the money arising from any particular chattel. Suppose he departs from the directions of the law as to selling, leaves the property to answer executions, and points out to the sheriff what has come to his hands, and he levies, and amongst other things takes the horse in dispute and sells him, no notice being given; is this a conversion by him individually? Yet this would be a conversion in the finder of goods, for they would go to his use; he would have disposed of them as his own.

If A. deliver goods, which afterwards turn out to be the property of B., to C., to deliver to D., and C. does so deliver them, having no notice that they are the property of B., is he guilty of a conversion of them to his own use? The most analogous case which I can find to the supposed one now under consideration, is that in which I understand it to have been settled, that if a sheriff levy an execution on the goods of a bankrupt, and sell them after the act of bankruptcy, but be-

fore commission and assignment, he is not liable in trover, though the goods cease to be the goods of the bankrupt, from the moment of the act of bankruptcy. But the plaintiff, at whose suit they were seized, is liable to the action; for though equally ignorant, they came thus to his use. Before assignment, the sheriff is presumed to be ignorant of the act of bankruptcy, and is acting in obedience to the writ (how it would be if express knowledge of it was proved, is another question); but after commission and assignment, which is public and notorious to all the country, he can no longer plead ignorance, and acts at his own peril. Our legislature, by various statutes, has shown a disposition to protect executors and administrators, who are honestly doing their duty, against individual loss. If a party does not know his own rights, why shall an executor or administrator of the adverse claimant be presumed to know them? If, from any cause, he be unable to make his rights known, even by a demand *in pais*, why shall his misfortune, if he lose his property, be visited on one equally innocent with himself.

But the present case is not considered as presenting the broad proposition laid down in the case above supposed. It presents the case of a slave conveyed in trust by a deed duly recorded (there being no objection to the deed, as not being duly recorded), and there is consequently implied notice, at least, that the title was not in the intestate. This is not a case of demurrer to evidence; and we know not what was proved.

All I mean to say in this case is, that as I am at present advised, I am not prepared to affirm the broad doctrines which have been contended for; nor am I entirely prepared to disaffirm them. I wish the point, as it really is not involved in this case, not to be considered as settled by it.

THE SUBJECT OF TROVER is considered at length in the note to *Hosier's Adm'r v. Skull*, 1 Am. Dec. 585.

TROVER BY FINDER OF LOST ARTICLES.—See note to *Brandon v. Hunsville Bank*, 18 Am. Dec. 55.

HALEYS v. WILLIAMS.

[1 LEIGH, 140.]

JUDGMENT—CREDITORS may, in equity, come upon the equitable estate of their debtor, in real estate, in the order of the date of their judgment, the oldest having priority.

IN EQUITY, JUDGMENTS ARE LIENS ON THE WHOLE of the debtor's equitable estate; and the whole is first to be applied to the elder judgment, then the whole of the residue to the junior judgment.

BILL in equity filed by James and Richard Williams, judgment-creditors of Mereday Haley, seeking to have set aside certain conveyances made by him prior to the recovery of their judgments, on the ground of fraud, and the property subjected to their judgments.

James' judgment was the elder. Both of the judgments were recovered upon debts contracted before the conveyances were made. Executions sued out on their judgments had been unavailing.

The chancellor held the charges of fraud were fully proved, and made decree according to the prayer of the bill. The Haleys appealed.

Stanard, for the appellants.

Johnson, contra.

GREEN, J. The transactions impeached in this case are so palpably fraudulent, that it would be a waste of time to discuss the proofs in detail. The decree subjecting the property in question to the satisfaction of the plaintiff's judgments is, therefore, right in principle, but it is erroneous in its details in several particulars. (Here the judge pointed out several errors in the details of the decree, and indicated the proper corrections thereof; they involved no principle.) The decree directs that Richard Williams shall participate equally with James Williams in the distribution of the funds held liable to their demands, whether they be sufficient to pay them in full or not; whereas the latter, having obtained the first judgment and placed the first execution in the sheriff's hands, is entitled to priority, both in respect to the real and personal property, the judgment binding the former, and the execution delivered, the latter in equity.

It is a settled rule in respect to the satisfaction of judgments and other liens upon an equitable fund, where neither has the legal title, that all are to be paid according to their priority in point of time, upon the maxim, in *equale jure, qui prior est in tempore, potior est in jure*: *Symmes v. Symonds*, 4 Bro. P. C. 328. (Tomlin's ed.); *Brace v. The Duchess of Marlborough*, 2 P. Wms. 495. And in this case the fund is equitable, so far as the judgment-creditors are concerned, the legal title being in the trustees for the security of the debt due to F. James & Co., which has a priority over the judgments.

This leads us to a more particular examination of the questions suggested in the argument, as to the extent to which the plaintiff's judgments and the proceedings under them, operated

as an equitable lien upon the trust property. As to which, it was insisted, on the part of the appellants, that only three fourths of the land was bound, a moiety by the first judgment and a moiety only of the remaining moiety by the second. This question might be very properly raised if the subject upon which the judgments operated was lands, of which the debtor was seised, and which might be extended at law. And, even in that case, I should strongly incline to the opinion that two judgments, at different times, would, under all circumstances, and no matter when *elegits* were taken upon them and executed, bind the whole of the debtor's land, each a full moiety. The words of the writ command that a moiety of the lands of which the defendant was seised at the time of the judgment, or at any time after, shall be delivered to the plaintiff. If, therefore, an *elegit* upon the second be executed before one upon the first judgment, a moiety would be taken; for the debtor, in that case, would continue seised of the whole, and no injury would be done to the creditor who had the prior judgment, as a moiety would be left to satisfy his *elegit*; and as to the effect of two *elegits*, under those circumstances, there does not appear ever to have been any doubt. So, if an *elegit* were executed on the prior judgment, and afterwards an *elegit* taken up on the latter, it seems to me that the remaining moiety might be taken; for, notwithstanding the extent under the first *elegit*, the debtor continues seised of the land extended, since the tenant by *elegit* has no freehold, but only a chattel interest which goes to his executor, and is extendible only as a chattel: 2 Inst. 396; 10 Vin. Abr. 543; Execution, M. Pl. 1, and the notes there; 11 Id. 173, 5; Executors, Z, 2, pl. 6, 23, 30, 34. Accordingly, it was held that the whole of the land might be taken by two successive *elegits*, under these circumstances: 10 Edw. II., Execution, cited at the end of the case of *Huit v. Cogan*, Cro. Eliz. 483. In this last case, however, the court held that the second *elegit* should only take a moiety of the remaining moiety, but advised the sheriff to return the special matter. The point, therefore, does not appear to have been adjudged.

Again, in the case of the *Attorney-general v. Andrew*, Hardr. 23-27, in which it was held that upon two contemporary judgments the whole might be taken, a moiety under each, it was said in argument that upon a second *elegit* only a moiety of the remaining moiety could be taken; for which was cited *Huit v. Cogan*, before noticed, and *Burnham v. Bayne*, 2 Brownl. 96, in which that point was agreed by all the judges. And in *Puke..*

v. *Burbeck*, 12 Mod. 357,¹ Holt, C. J., said, that although, in such a case, only a moiety of the remaining moiety ought to be taken, yet if the whole of the remaining moiety be in fact taken, this is well, and no *audita querela* would lie. Although, then, there is no adjudged case, contradicting that of the 10 Edw. II., yet these repeated and imposing dicta would induce me to pause, if it were necessary to decide that point in this cause, though upon the whole I should probably follow the ancient decision, as conforming to the literal effect of the writ, and the true spirit of the law.

It is, however, unnecessary to decide that point here, since, if the lien of a judgment upon an equitable subject was in all respects analogous to its lien upon lands of which the debtor had a legal seisin, upon the principle that equity follows the law, yet no *elegit* being in fact executed or capable of being executed, a court of equity upon the familiar principle of marshaling securities, according to which, when several have liens upon the same subject, they will be so arranged in equity that he who has the prior security shall use it in such a way as not to affect the interests of the others, if that can be done without injury to himself, would postpone the effect of James Williams' elder to that of Richard Williams' junior judgment, so as to make the case analogous to that at law, where an *elegit* upon a posterior judgment is executed before one is taken out on a prior judgment, in which case, each would take a full moiety: see the cases referred to in 1 Mad. Ch. 202, upon the subject of marshaling securities. The rights, however, of judgment-creditors, in respect to an equitable fund, are not analogous to their rights at law, but stand, particularly in respect to property in mortgage, upon an entirely different foundation. A judgment-creditor acquires an equitable lien upon the equity of redemption in the debtor's property subject to mortgage. And a court of equity, upon the principle that equity follows the law, would, if it were practicable, only give the same effect to the equitable lien as would be given to it at law, if the subject of the lien was a legal title, that is, would only subject a moiety.

But that is impracticable, since the only means by which a court of equity can enable the creditor to reach the equity of redemption, is to allow him to redeem; which can not be done with a proper regard to the rights of the mortgagee without requiring him to redeem *in toto*, and not for a moiety only. The consequence of which is, that acquiring by that means the legal

1. *Pullen v. Purbeck*, 12 Mod. 357.

title to the whole, the creditor can not be redeemed by the debtor without paying not only the whole of the mortgage debt, but also the whole of the judgment, upon another principle of equity, that he that asks equity, must do it. An example of this is to be found in the case of *Stileman v. Ashdown*, as reported in Ambler, p. 13; see, also, *Bacon v. Ashby*, Finch, 366; *Morret v. Westerne*, 2 Vern. 663. To the purposes of this case, the deed of trust has the same effect as a mortgage.

In strictness, R. Williams' judgment, upon which no execution had been put into the sheriff's hands, at the time of the filing of the bill, was no lien in equity upon that portion of the trust property which was personal, nor could he rightfully resort to a court of equity as to that subject: *Shirley v. Watts*, 3 Atk. 200. Yet he was right in court, as to the lien of his judgment on the equity of redemption in the land, as was James Williams, in respect both to the real and personal subject. And R. Williams having placed an execution in the hands of the sheriff, pending the suit which has been returned *nulla bona*, he might reach the personal fund by filing a supplemental bill, if that were necessary. But it is not; he, like any other creditor who had acquired a lien upon the personal property in question, by judgment and execution delivered to the sheriff, may exhibit his claim before a commissioner without a bill, and have satisfaction out of the fund, according to his rights in respect to priority: *Burroughs v. Elton*, 11 Ves. 29.

The result is that the defendants Joseph, Philip, and William Haley are entitled, first to satisfaction out of the trust fund for the balance of the debt due originally to F. James & Co., secured by the deed of trust, and transferred to them, after deducting whatever they may be found to have received from the hires of the slaves and the rents and profits of the mill and lands, or from the disposition of any of the slaves, and the value of the personal property which they acquired under color of the sale of September 29, 1823; and James Williams next, and then Richard Williams, are entitled to satisfaction of their judgments, or of so much of Richard Williams' as may be due out of the residue. And any surplus should be paid over to such of the defendants as may show that he or they are best entitled to it.

CARR, J. With respect to the remarks of my brother Green on the subject of the *elegit*, viz., that if the *elegit* of A. be levied on the half of B.'s land to-day, and to-morrow C. get a judgment against B., C. by his *elegit* can take the other half of the

debtor's land, I do not mean to say that I am against it; my impression has been otherwise; but I have not examined the subject, nor does it arise in this case. I mean merely to say, that I have no opinion with respect to it.

CABELL, J. I wish it to be understood, that I give no opinion on the question how far two *elegits* may, under all circumstances, be made to reach the whole land of the debtor. That question is not necessary to be decided in this case.

The whole court concurred in a decree approving the principles of the chancellor's decree, but correcting several of its details, and conforming with the results stated in the opinion of Judge Green.

BROOKE, President, and COALTER, J., absent.

LIEN OF JUDGMENT UPON DEBTOR'S REALTY.—See *Jones v. Jones*, 18 Am. Dec. 327 and note 343.

COPLIN v. McCALLEY.—SAME v. SEHON.

[1 LEIGH, 280.]

THE OFFICIAL BOND OF AN OFFICER holding during the pleasure of the court, which is directed by statute to take a new bond every three years, will bind the sureties for the misconduct of the officer even after the three years there being no new bond given.

FOR CLERK'S TICKETS delivered after the first of June, in any year, the sheriff is not bound to account until the first of November of the next year.

THE two motions were heard together. One was made by McCalley against Heiskell and his sureties to have judgment against them for failure of Heiskell, marshal of the court of chancery, to pay over moneys collected on behalf of McCalley. The other was made by Sehon, the clerk of the court of chancery, for judgment against the same parties for failure of Heiskell to account for sundry accounts or tickets placed in his hands for collection by the clerk for fees due Sehon. The tickets were delivered to Heiskell, June 5, 1821. On both motions judgment was given as moved for; interest being calculated in the second case from November 1, 1821. It appeared that the bond on which Coplin and others were sureties was conditioned for the faithful discharge of Heiskell's duties, but that more than three years had elapsed since it was given, and the court had not caused the bond to be renewed within three years, nor after the expiration of the time, as the statute directs.

The sureties appealed.

Leigh, for the appellants, contended that, notwithstanding the marshal held office during the pleasure of the court, his sureties were not liable for more than three years, as the statute directs that "the court shall cause the official bond to be renewed from time to time, as occasion shall require, not exceeding in any case three years;" and provides that such new bond "shall supersede the former so far only as that the sureties in the former shall be in no manner liable under it for any act done, or for any omission, after the date of the latter." Sureties are liable only for the faithful performance of an officer's duties during the existing term: *Arlington v. Merrick*, 2 Wms. Saund. 412, 414, note 5; *Commonwealth v. Fairfax*, 4 Hen. and M. 208.

Johnson, contra.

By Court. The doctrine of *Arlington v. Merricks*, and that class of cases, is, that where an official bond is given for the faithful discharge of the duties of an officer by the officer during his continuance in office, and the office is of a certain limited term of duration, though the officer be, in fact, reappointed to or continued in the office for another term or longer, the obligation of the bond is only coextensive with the existing term of office. But the tenure of the marshal's office was during the pleasure of the court, his official bond bound his sureties for his conduct in office, and the obligation of this bond was coextensive with the duration of this office. The failure of the court to require a new bond did not determine his office. The statute directs the new bond for the better security of persons interested in the officer's official conduct. It provides, in express words, that the new bond shall supersede the former, so far only as to exempt the sureties in the former from liability for official acts and omissions after the date of the latter. The marshal's sureties in the first bond became thereby bound for his official conduct until his office should be determined by removal or otherwise, or until he should give a new bond.

There is, indeed, an error in *McCalley's case*, but it is an error against him. The statute entitled him to damages at the rate of fifteen per cent. per annum on the amount collected by the marshal for him and not paid over: 1 Rev. Code, c. 134, sec. 43, pp. 542, 543. The judgment gives him damages only at the rate of six per cent. Of this he has not complained, and the appellants can not. This judgment is to be affirmed.

There is error in *Sehon's case*, prejudicial to the appellants.

The appellee's clerk's tickets were delivered to the marshal for collection, after the first of June, 1821, and the officer was not bound to account for them on the first of November following. Upon a just construction of the fee law, those tickets are to be considered as delivered before the first of June, 1822, and the officer accountable for them on the first of November, 1822. The judgment awards damages to be computed from the first of November, 1821. It ought to have allowed them only from November, 1822. This judgment is to be reversed for this cause and corrected in this respect.

CARE, J., absent.

CREWS v. PENDLETON.

[1 LEIGH. 297.]

GROWING CROPS—AS BETWEEN THE MORTGAGEE of land, who purchases at the foreclosure sale, and execution creditors of the mortgagor, in possession, the former is entitled to the growing crops.

AN INJUNCTION LIES to protect the interest of the purchaser at a foreclosure sale before it has been confirmed, as against the execution sued out by the creditors of the mortgagor.

BILL for an injunction. Long mortgaged certain lands, slaves, household furniture, and stock to Crews and the Brydies, the mortgagor to have possession until default made, and then the mortgagees to enter. In May, 1822, the chancellor decreed that Long's equity of redemption should be foreclosed if the debts due were not paid in six months, and that the marshal should sell the whole for cash. In June, 1823, the property was sold and bought in by Crews, there being a crop of wheat, oats, Indian corn, and tobacco growing on the land which had been sown and planted by Long, who had been allowed to retain the possession of the land, and the slaves and stock upon it, until the day of the sale. Before the marshal's sale had been reported and confirmed, Pendleton and Mountcastle sued out a *fiery facias* against Long, and caused it to be levied on the tobacco hanging unstripped in the tobacco house, a parcel of Indian corn, and of fodder and oats in the stacks, being part of the crop of 1823, then gathered. Crews filed his bill against Pendleton and Mountcastle, setting forth that he had purchased at the sale, the land with its crops; that the proceeds of the sale had fallen short of the amount secured by the mortgage; that he had, with his own means, finished and gathered the crops, and that they were his property, though he intended to apply the net proceeds thereof towards the satisfaction of the balance

of the mortgaged debts; and prayed an injunction to restrain further proceedings under the defendants execution.

The chancellor dissolved the execution. Crews appealed.

Johnson, for the appellant, in support of the position that the purchaser, under a decree in chancery, is entitled to the profits of the land, cited Sugd. on Vend. 41, 42; *Wren v. Kirton*, 8 Ves. 502; *Barker v. Harper*, Coopers' Ch. Cas. 82.

R. C. Nicholas and Scott, contra.

CARR, J. The order of dissolution does not state the ground on which the chancellor proceeded; it must have been, either: 1. That he had no jurisdiction; or, 2. That there was fraud; or, 3. That the purchase of Crews gave him no right to the growing crops.

Upon the ground of fraud, I can hardly suppose the chancellor acted. His decree in the first suit, acquiesced in by all, and to which the appellee Pendleton is stated to have been a party, had pronounced the mortgage fair, decreed their debts to the mortgagees, and ordered a sale. If the allegations in the answer of the use by Long of the crops, of his continued possession, and of a fraudulent combination between him and Crews, had raised suspicions in the mind of the chancellor, of the fairness of the transactions subsequent to the decree, he surely would not have taken these allegations (not responsive to the bill) as proofs, but would have given time for the taking of evidence. He would not have dissolved the injunction the very day after it was granted.

As to the question of jurisdiction, though few are more zealous of equity on this point than I am, I think there can be no doubt about it. The chancellor had decreed a sale of the mortgaged property; under that sale, Crews had bought, and received possession from the officer of the court; the whole matter was still pending. If the marshal had made his report, the court had not acted upon it. The order of sale did not authorize the marshal to make a deed to the purchaser, but merely to sell for cash, pay the debts due the mortgagees, and report his proceedings to the court. Crews' purchase did not give him the legal title till the chancellor should confirm the sale, and a deed should be made to him. Till this was done, it was the bounden duty of the court to protect the purchaser. In contemplation of law, the property was still in possession of the court. The application to the chancellor, then, was the natural and proper resort.

With respect to the growing crops, the question does not

seem to me to involve the general doctrine of emblements, but to depend on the particular contract of the parties. There can be no doubt that if one sell his land without any reserve, all the crops not severed will pass to the purchaser. They are a part of the subject, and enter into the price. The contract between the mortgagor and mortgagees is, in effect, this: "I convey you my land, slaves, etc., as a security for the debts I owe you; I bind myself to pay you those debts by a given time, and if I fail you may proceed and get a decree for a sale of the subject; meantime, I remain in possession, use the slaves, and take the profits of the land; but whenever you get a decree you may immediately sell everything." Under this agreement, if the mortgagor goes on and makes preparation for a crop, he does it with a full knowledge that the land with the crop is subject to be sold, if the decree be obtained before he severs it. Nor does he lose anything by this; for the crop on the land enhances the price; if by this increase the debt be overpaid, he gets the surplus; if not, still the full value of his labor goes (as he had agreed it should go) to the payment of the debts secured by the mortgage.

In this case, such a result seems the more just, as the crop was prepared with the mortgaged slaves, and as (the sale being in June) a great portion of the labor in producing, gathering, and saving the crop, was performed by the purchaser.

The other judges concurred; and the decree was reversed, and the cause remanded, that the injunction might be reinstated.

AT AN EXECUTION SALE OF LAND, CROPS then growing pass to the purchaser: *Porche v. Bodin*, 23 La. An. 761, and cases cited; *Bear v. Bitzer*, 16 Pa. St. 175; *Bittinger v. Baker*, 29 Id. 66; *Heishey v. Metzgar*, Supreme Ct. of Penn. May term, 1879, 9 Reporter, 384; *Pitts v. Hendrix*, 6 Ga. 452. A distinction is observed in the latest Pennsylvania decision above quoted, wherein Judge Trunkey, speaking on behalf of the court, stated that "the purchaser of land at sheriff's sale is entitled to the growing grain thereon, which has not been severed before the sale." "The test is, whether there has been a severance of the growing grain; if so, it does not pass to him who purchases the land subsequent to the severance; if not, it goes with the land." Illustrating the distinction made, two early decisions of that court were referred to. In one, grain growing had been sold on an execution against the debtor, before sale of the land upon a *vend. ex.*; it was decided that severance was implied, and that the grain did not pass with the land: *Stambaugh v. Yeates*, 2 Rawle, 161. In the other, a mortgagor assigned all his property for the benefit of his creditors; it was held that the growing grain passed to the assignees, and not to the purchaser at sheriff's sale of the land sold by virtue of the *levari facias*, because the assignment amounted to a severance: *Myers v. White*, 1 Rawle, 353. The facts of *Heishey v. Metzgar*, *supra*, furnish a

still further illustration of this distinction. One of the defendants purchased a farm of the plaintiffs, giving in part payment therefor a judgment on which a *f. fa.* was subsequently issued and levied on the land, stock, and grain in the ground. The defendant claimed the exemption allowed by law, and on the appraisement he elected to take two fields of growing grain. They were set off to him, one of the plaintiffs being present and making no objection. Under the *vend. ex.* the land was sold and purchased by the plaintiffs, who now sued the defendants in trover for cutting and carrying away the crops. Under these circumstances the appraisement of the growing grain was deemed a severance, operating to prevent its passing to the purchaser under the execution.

In *Bittinger v. Baker*, 29 Pa. St. 66, after a review of the early adjudications of that state, it was concluded that a lessee of land, incumbered with a judgment prior to the lease under which the premises are levied and sold, is entitled to the way-going crops sown by him prior to the levy and condemnation, in preference to the sheriff's vendee.

In Ohio, a different rule from that first above laid down prevails. The growing crops do not pass to the purchaser of the land, under an execution sale: *Cassilly v. Rhodes*, 12 Ohio, 88; *Houts v. Showalter*, 12 Ohio St. 124. It is conceded in the latter decision that the doctrine in that state is contrary to the current of authority elsewhere. The reason of the exception in Ohio is found in their manner of conducting judicial sales. There, real estate must first be appraised before it can be sold under execution, and then it must bring at least two thirds of the appraised value. In estimating this value the crops are not taken into consideration; and, therefore, "the debtor's rights can be saved only by regarding the annual crops as personalty, requiring a separate levy." In *Houts v. Showalter*, where the remark quoted may be found, it is further said: "These reasons, while they can have no application where no appraisement is required, and no minimum is fixed below which the sale shall not be made, are yet, it seems to us, just and conclusive under the peculiarities of our own legislative policy." Although this same system of appraisement exists in Indiana, it was decided, in *Jones v. Thomas*, 8 Blackf. 428, that growing crops do pass to the purchaser of real estate, on its sale under an execution. Chief Justice Brinkerhoff, commenting upon this decision, in *Houts v. Showalter*, *supra*, said that it "was apparently decided solely on the authority of cases adjudged where our system of appraisements is unknown, and without any consideration of the reasons derived from peculiar legislation on the subject, on which *Cassilly v. Rhodes* was decided. With those reasons we are satisfied."

The same question, who is entitled to the growing crops, has arisen on the foreclosure of the mortgage on the lands upon which the crops were standing. And in harmony with the rule first above enunciated, it has been judicially determined that neither the mortgagor nor his lessee, subsequent to the giving of the mortgage, is entitled to the crops growing on the land at the time of the foreclosure and sale; they belong to the purchaser: *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Lane v. King*, 8 Wend. 584; *Shepard v. Philbrick*, 2 Denio, 174; *Simers v. Saltus*, 3 Id. 219; *Gillett v. Balcom*, 6 Barb. 370; *Jewett v. Keenholz*, 16 Id. 193; *Gardener v. Finley*, 19 Id. 320; *Jones v. Thomas*, 8 Blackf. 428; *Howell v. Schenck*, 24 N. J. L. (4 Zab.) 89.

In *Porche v. Bodin*, 28 La. An. 761, the plaintiff leased certain premises which had been previously mortgaged by the lessor for the purchase-money. Pending the lease, the mortgage was foreclosed, and the premises purchased by the defendants. There was corn growing on the land at the time of the

sale, which was claimed by the defendants, and which they proceeded to gather. The plaintiff prayed an injunction. The suit was dismissed, and an appeal taken. The supreme court said, *per* Wyley, J., Morgan, J., dissenting: "We think the court erred. If the sale under the foreclosure of the mortgage containing the non-alienation clause dissolved the lease, still this did not transfer to the purchasers the crop of corn which was fully matured and ready to be gathered, and which did not belong to the mortgage debtor. Indeed, the mortgage certificate read at the sale, and copied in the deed to the purchasers, showed that the corn belonged to plaintiff. The crop was made before there was a seizure. It was the property of the plaintiff, less one fourth due for rent, and his title could not be divested in a proceeding to which he was not a party. By the sale, the purchasers acquired the property of the mortgage debtor, and the lessee had the right to remove his property, whether in the field or in the houses, from the leased premises. It is true, article 465 of the revised code says that standing crops are considered as immovable, and as part of the land to which they are attached, and article 466 declares that the fruits of an immovable, gathered or produced while it is under seizure, are considered as making part thereof, and inure to the benefit of the person making the seizure. But the evident meaning of these articles is, where the crops belong to the owner of the plantation they form part of the immovable, and where it is seized, the fruits gathered or produced inure to the benefit of the seizing creditor. A crop raised on leased premises in no sense forms part of the immovable. It belongs to the lessee, and may be sold by him, whether it be gathered or not, and it may be sold by his judgment-creditors. If it necessarily forms part of the leased premises, the result would be that it could not be sold under execution separate and apart from the land. If a lessee obtain supplies to make his crop, the factor's lien would not attach to the crop as a separate thing belonging to his debtor, but the land belonging to the lessor would be affected with the recorded privilege. The law can not be construed so as to result in such absurd consequences." As the evidence did not disclose the value of the corn, the judgment below was annulled, and the cause remanded for a new trial. The distinction made by the Pennsylvania court on the ground of "severance," is here seen plainly to exist.

In a recent decision by the supreme court of Oregon, another question was raised and made vital in determining the rights of parties to an execution, to crops growing on land: *Cartwright v. Savage*, 5 Or. 397, 398. Cartwright mortgaged certain lands to Savage; the mortgage was foreclosed, and the premises bought by Savage at the sheriff's sale. At the time, a crop of wheat was growing on the land. Savage entered into possession, but before the statutory time for redemption had expired, Cartwright redeemed, and then brought this action for the value of the wheat, which, in the mean time, had been harvested by Savage. A demurrer to the complaint was sustained, whence an appeal was taken. Said Judge McArthur, on behalf of the court: "The question to be determined is, whether or not the purchaser at a sheriff's sale, from the day of sale until the redemption, is entitled to the crops growing upon the land purchased. Section 304 of the Code regulates the matter of the possession of property sold upon execution issuing out of courts of law, and the same section applies to sales under decrees in equity. The section reads as follows: 'The purchaser, from the day of sale until the resale or a redemption, and the redemptioner, from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and, in such case, shall be entitled to receive

from such tenant the rents, or the value of the use and occupation thereof during the same period.' It is clear that Savage was entitled to the possession of the property, for it was not in the possession of a tenant holding under an unexpired lease. By virtue of this right of possession, a purchaser at a judicial sale may enter and use and occupy the premises, and thereby preserve the premises intact, and better prevent waste and destruction. If the premises are agricultural lands, the use must be for such ordinary purposes of husbandry as the premises could be put to during the time of his possession. He has no absolute legal right in and to the premises until the confirmation of the sale and the execution of a deed by the sheriff. It is well settled that if redemption be consummated, the effect of the sale is terminated, and the property is restored to its original condition. How can the property be said to be restored to its original condition, if, when redeemed, the judgment-debtor is obliged to take it back, denuded of the crops he himself had sown, and which, but for the accidental circumstance that the sale was made just before harvest, he himself would have reaped? We do not think that the section above quoted can properly be construed to give the purchaser any greater rights in the premises, in case there is no tenant, than where there is a tenant holding under an unexpired lease. In the latter case, all the purchaser could claim would be the rents, or the value of the use and occupation; and, in the former case, he is entitled to enter into possession, and use and occupy the premises for such purposes as they can ordinarily be put to during the time he is in." The judgment was, therefore, reversed.

Where the purchaser at an execution or judicial sale is entitled to the crops growing on the land at the time of the sale, his remedy for the taking and carrying them away may be in trespass: *Lane v. King*, 8 Wend. 584; *Simers v. Saltus*, 3 Denio, 219; *Brittain v. McKay*, 1 Ired. Law, 285. No objection to the form of action appears to have been made, where trover, *Heishey v. Mitagar*, 9 Reporter, 384; *Bittinger v. Baker*, 20 Pa. St. 66, or replevin, *Jones v. Thomas*, 8 Blackf. 423, was brought. And it would seem, from *Porche v. Bodin*, 28 La. An. 761, that an injunction might be resorted to for the protection of the purchaser's rights.

DUNLOP v. KEITH.

[1 LEIGH, 430.]

A CLAIM ARISING OUT OF OFFICIAL NEGLIGENCE of a clerk of a court, resident out of the state at the time the claim is asserted, is not a debt for which a foreign attachment in chancery lies.

NOR IS SUCH NON-RESIDENT OFFICER AMENABLE to the jurisdiction of the court of chancery as an absent defendant.

BILL setting forth that Dunlop & Co. had been greatly damaged by the official misconduct of Keith, a clerk of the county court, or of Stephenson, late high-sheriff; that Keith was absent in the District of Columbia; that complainants had attached certain moneys in the hands of an agent of Keith, and prayed judgment for the satisfaction of their claim out of said garnished moneys. The chancellor, not deciding the question

of jurisdiction, dismissed the bill on the ground that it did not appear which officer was in fault. Whence this appeal.

Johnson, for the appellants.

Leigh, contra.

By Court, CABELL, J. If the chancellor had not jurisdiction of the case stated in the bill, it will be unnecessary to look farther. As early as the year 1744, an act passed, 5 Hen. Stat. at large, p. 220, authorizing a suit in chancery against persons out of the country, and others within the country, having in their hands effects belonging to the absent defendants. But that act was intended to apply to those cases only in which the plaintiffs and the absent defendants stood towards each other in the relation of creditor and debtor; for the act recites, as the motive for its adoption, the great difficulties that had arisen in the recovery of debts due to the inhabitants of this country, from persons residing out of it. At a long subsequent period, in the year 1787, 12 Id. 466, 7, the legislature authorized proceedings against other absent defendants, similar to those which the preceding law had given against absent debtors. The provisions of both these laws, with some others on the same subject, are brought together in the revised code.

The bill of Dunlop & Co. states the case of a misfeasance of Keith in office; a mere tort, the action for which dies with the person. It is similar, in this respect, to the case of an escape of a person in execution, by negligence of a sheriff or jailer, which makes him personally responsible for the amount of the debt; but he was answerable at the common law, not as a debtor, but as a tort-feasor; and the action died with the person, upon the maxim *actio personalis moritur cum persona*: 11 Vin. Abr. 244, 5; Executors, H, a, pl. 1.

Is the case as stated in the bill, within either that branch of the statute which gives relief against absent debtors, or that which gives against other absent defendants relief similar to that which is given against absent debtors? The court thinks it comes within neither. Not within the first; for, although the term debtor should, in the construction of this statute, be taken in its largest sense, as embracing every person against whom another has a claim, for breach of contract, even where the compensation sounds in damages; yet Keith can not be embraced by it, since his case is that of a mere tort-feasor. If he had given an official bond, that would have varied the case. But it does not appear that he gave any. Nor can it come

within that branch of the statute which authorizes the same proceedings against other absent defendants, that are allowed against absent debtors. This part of the statute was not intended to extend the jurisdiction of equity to subjects over which it had not jurisdiction before; but to enable the court of chancery to exercise over persons abroad a jurisdiction to which they would, if they were here, be jointly amenable with the home defendants, in cases in their nature proper for the jurisdiction of equity, such as partners, legatees, joint contractors, etc. Nobody would contend that Keith, if in Virginia, would be liable to be sued in equity, on the case stated in the bill, either separately, or jointly with the other defendants. And the same remark applies to the representatives of the sheriff.

On this ground, the decree is affirmed.

RAWLINGS v. COMMONWEALTH.*

[1 LESSON, 581.]

ON THE TRIAL OF AN INDICTMENT FOR AN ASSAULT, the defendant can not give evidence in mitigation of the fine, that the prosecutor was on bad terms with him, and had on days previous to the assault used provoking and abusive language of and to him.

INDICTMENT for an assault on one Jones. Plea, not guilty. Verdict of guilty, with fine imposed, for fifty dollars. At the trial the defendant offered, "in mitigation of damages," to prove that the informer Jones "had been on bad terms with him, and on previous days to the time of making the assault, and at other places, had used provoking and abusive language of and to him." The evidence was rejected, whence an exception was taken, and on that ground a petition for a writ of error filed in this court.

PARKER, J. The evidence offered by the defendant tended to establish two points, to wit, the prosecutor's previous hostility, and his antecedent provocations; and the question is, whether it ought to have been received in mitigation.

It can scarcely be contended that the "bad terms" existing between the prosecutor and defendant could have any other effect than to render it probable that the assault had been made through revengeful feelings. The only question, therefore, is as to the provoking and abusive language used on previous days.

* This case was argued and determined in the General Court of Virginia.

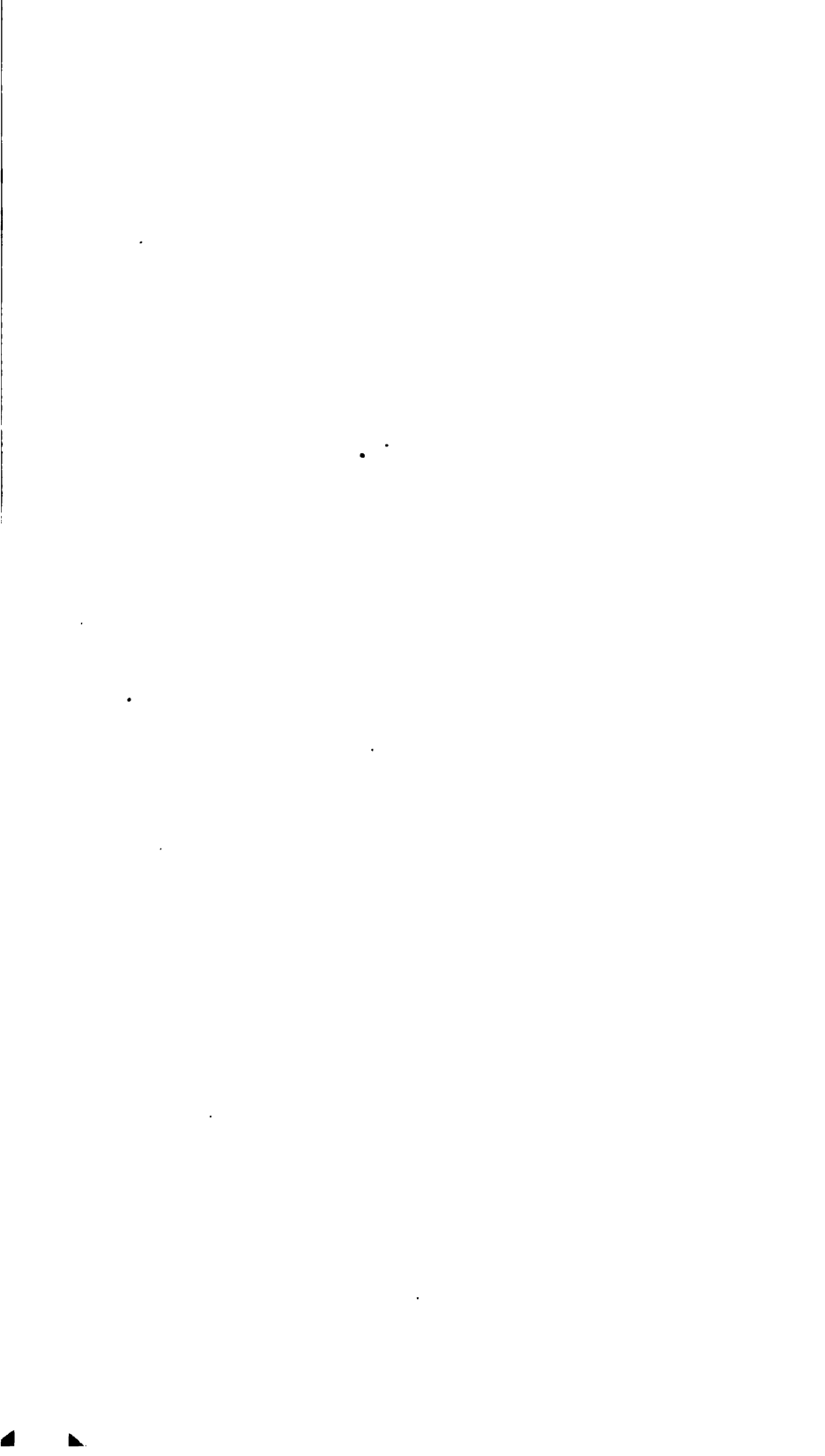
On this point, we have not looked to English authorities in cases of indictments for assaults, because the practice in England and in several of the states is for the court, which fixes the punishment, to hear evidence in mitigation of the fine, and that evidence may be often loose and irregular, because the correction is in the breast of the court. But we have looked into civil cases of this character, where evidence of previous provocations has been offered in mitigation of the damages, the principle of which is strictly applicable, where evidence for the same purpose is offered in a case of misdemeanor, to lessen the fine. We particularly refer to the cases of *Avery v. Ray*, 1 Mass. 12; *Lee v. Woolsey*, 19 Johns. 319 [10 Am. Dec. 230], and *Waters v. Brown*, 3 Marsh. 559. They established this principle, that previous provocations, to have the effect of mitigating the damages, should be so recent as to induce a fair presumption that the violence was committed during the continuance of the feelings and passions excited by them, and such as in fact may be fairly considered a part of one and the same transaction. This rule is adopted in analogy to the one which prevails in cases of homicide. Antecedent provocations will not there mitigate the offense, if a sufficient time has intervened between the provocation and the killing, for passion to subside, the warm blood to cool, and reason to interpose; for the law which notices the weaknesses of men will not indulge their passions. A contrary course would not only encourage an appeal to force and violence in every case of real or supposed insult, but would lead to inquiries wholly different from the one on the record, and thus divert and distract the attention of the jury. It is a matter of necessity, that all the parts of the same transaction, and whatever is immediately connected with and led to it, should be heard and considered, although involving several inquiries.

But the courts have steadily resisted any extension of this rule, to prevent the attention of the jury from being drawn from the issue they are sworn to try, to the examination of collateral facts. The case under consideration might have furnished an exemplification of the impropriety of permitting such evidence; for if the defendant had been allowed to give in evidence provocations received on previous days, and at different places, the prosecutor ought to have been allowed to show under what circumstances they were offered; and then where would be the stopping point? The court is, therefore, of opinion, that immediate provocations only, or such as are plainly a part of the *res gesta*, received so recently that the blood has not had

sufficient time to cool, can properly be received in evidence for the purpose stated in the bill of exceptions; and that the circuit court of Orange did right in rejecting such as was offered by the defendant, he not having shown on the record the relevancy of such inquiries to the issue joined.

It has indeed been suggested that, as under some possible state of things, previous provocations, even on a former day, might be admitted as explanatory of the transaction itself, namely, where allusion to them is made at the time, the court, in this case, ought to have received the testimony offered, with an instruction to the jury to disregard it, if the connection between the insult and the violence was not established to their satisfaction. But we think that it is not only the province, but the duty of the court, to decide on the admissibility of evidence, with reference to the facts in issue, even although such admissibility depends on matters of fact; and to reject it, if a proper foundation is not laid for its admission, lest the jury might be prejudiced and misled by testimony, which, upon the subsequent facts proved, might turn out to be irrelevant and improper. The course pursued in relation to confessions of guilt, and to declarations made in *articulo mortis*, both depending upon the circumstances or facts of each case, furnishes the illustration of this rule. The defendant in the present case shows by his bill of exceptions no collateral facts which might have justified the court in admitting his proof. He offered evidence *prima facie* inadmissible. He established no connection between the assault and battery charged upon him and the provocations he had previously received; nor did he offer any fair presumption from which the court ought to have concluded that the one was the consequence of the other, and committed before his blood had time to cool.

Under these circumstances the court is clearly of opinion that his application for a writ of error ought to be overruled.



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ANIMALS FERÆ NATURÆ.

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APPEALS.

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7. **ON EXCEPTIONS TO THE OPINIONS OF THE COURT**, taken at the trial on specific points, the appellate court will consider such points only as were presented to and decided by the court below, though, from the exceptions, it may appear that other points might have been made. *Newsum v. Newsum*, 739.

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1. ON AN ASSIGNMENT FOR CERTAIN PREFERRED CREDITORS, of real and personal property, to secure the payment of their debts, the realty must be first applied toward the payment of those debts, the conveyance being absolute on its face, and resort then had to the personalty, the residue being liable for the debts of other creditors of the assignor. *Webb v. Peck*, 284.
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See BANKRUPTCY AND INSOLVENCY; CHAMPERTY.

ASSUMPSIT.

1. THAT THE LAW RAISES AN ASSUMPSIT against the person benefited by the payment of money is not universally true. A stranger can not make a man his debtor against his will, by paying off such man's indebtedness. *Turner v. Egerton*, 235.
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See STATUTE OF FRAUDS, 2; USE AND OCCUPATION.

ATTACHMENT.

1. ONE WHOSE PROPERTY IS WRONGFULLY ATTACHED in a suit against another, may sell his property while under attachment, and the vendee may bring trespass in the name of the vendor against the attaching officer. *Holly v. Huggeford*, 303.
2. TRESPASS BY THE OWNER OF GOODS CONIGNED to a factor who has a lien thereon for a balance due him from the owner, will lie against the officer who attaches the goods as the property of the factor. *Id.*
3. WHERE GOODS ON BOARD OF A VESSEL were stated by an officer to be attached, who, however, did not go below or see them, as they were in the lower hold, covered by other goods, but who paid the freight to the master and left a keeper in charge, who took possession several days after,

when the goods were hoisted from the hold, it seems that these proceedings constituted a valid attachment. *Naylor v. Dennie*, 319.

4. AN OFFICER WHO ATTACHES THE GOODS OF A STRANGER is liable in trover without demand. *Woodbury v. Long*, 345.
5. DEPUTY SHERIFF TAKING A RECEIPT to himself for property attached by him, may maintain suit thereon in his own name. *Spencer v. Williams*, 711.
6. IN AN ACTION ON A RECEIPT given for goods attached, the defendant will not be permitted to prove that the goods were not attached, nor were even in the sheriff's possession, nor delivered by him to the defendant. *Id.*

See GARNISHMENT; PARTNERSHIP, 5, 6, 7; STOPPAGE IN TRANSITU, 2.

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1. PLAINTIFF CAN NOT RECOVER HIRE OF SLAVE if he knew the slave was unsound, and fraudulently concealed it from defendant, providing the latter, within a reasonable time after discovering the fraud, offered to return the slave and rescind the contract. *Reading v. Price*, 162.
2. BAILER'S POSSESSION is the bailor's. *Philips v. Harries*, 166.
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See REPLEVIN, 4, 5.

BANKRUPTCY AND INSOLVENCY.

1. THE DIFFERENT INSOLVENT LAWS OF A STATE constitute one general system, and must be construed together. Under such construction, the trustee must give a bond with sureties before he can act. *Winchester v. Union Bank*, 253.
2. THE TRUSTEE OF AN INSOLVENT DEBTOR DERIVES HIS RIGHT from his appointment, and, as the law requires he should give bonds before acting as such, until such bond is given he can not sue for, nor in any other manner intermeddle with the property of the insolvent. *Winchester v. Union Bank*, 255.
3. *IDEM*.—A bond given after suit is commenced does not relate back so as to entitle the trustee to recover. *Id.*
4. BANKRUPT'S ASSIGNEES TAKE SUBJECT TO EQUITABLE CLAIM.—The general assignees of a bankrupt take the estate subject to all existing equitable claims of third persons, and can not defeat such claims though they had no notice thereof at the time of the assignment, they not being regarded as *bona fide* purchasers. *In the Matter of Howe*, 395.
5. VOLUNTARY ASSIGNEES FOR THE BENEFIT OF CREDITORS are subject to the same rule. *Id.*

See ASSIGNMENT, 2, 4, 5, 6; BANKS AND BANKING; CHAMPERTY; FRAUD, 4, 5.

BANKS AND BANKING.

1. SPECIAL DEPOSIT IN A BANK is at the risk of the depositor, but if money so deposited is converted to the general purposes of the bank by its officers or agents without the depositor's consent, they are personally liable to him, and he may follow such money into the hands of third

persons receiving it with a knowledge of his rights, or not having paid an equivalent therefor in the ordinary course of business. *Matter of Franklin Bank*, 413.

2. GENERAL DEPOSITS become the property of the bank, and may be employed in its business. *Id.*
3. GENERAL DEPOSITOR, THEREFORE, IS MERELY A GENERAL CREDITOR of the bank, and is not entitled to any priority of payment over other creditors in case of bankruptcy. *Id.*

BILLS OF PEACE.

BILL OF PEACE WITH RESPECT TO PERSONALTY will not be sustained, unless the complainant has established his title at law, or it is necessary to prevent a multiplicity of suits. *Low v. Lowry*, 585.

BONA FIDE PURCHASERS.

1. BONA FIDE PURCHASER IS NOT AFFECTED BY FRAUD in his vendor, where the latter has the legal title to the property sold. *Miles v. Oden*, 177.
 2. BONA FIDE PURCHASER FOR FULL CONSIDERATION, without notice, can not be affected by a fraud committed in a transaction to which he was not a party. *Thomas v. Mead*, 187.
 3. NOTICE TO SUBSEQUENT PURCHASERS of the grantor's land of the grant of a right to erect a dam, will not be conclusively presumed, from the erection and occupation of the dam by the grantee for six months in the year, and by a stranger for the other six months. *Boynton v. Rees*, 326.
 4. A PURCHASER WITHOUT NOTICE of an incumbrance can convey land free of the incumbrance to one having notice. *Id.*
 5. BONA FIDE PURCHASER FROM THE FRAUDULENT VENDOR in such a case, having paid for the goods without notice of the fraud, will be protected. *Durrell v. Haley*, 444.
 6. PURCHASER HAVING SUFFICIENT NOTICE to put him on inquiry is not a bona fide purchaser. *Id.*
- See BANKRUPTCY AND INSOLVENCY, 4, 5; COVENANTS, 7.

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CHAMPERTY, MAINTENANCE AND BARRATRY.

CHAMPERTY STATUTE DOES NOT APPLY TO DEVICES, judicial sales, or assignments under the insolvent act. *Varick v. Jackson*, 571.

CHATTEL INTERESTS.

See DEEDS, 21.

COMMON RECOVERY.

1. IN A COMMON RECOVERY, the tenant to the *precipue* must be tenant by a legal title; if his title rest only in articles of agreement, the recovery is void. *Stump v. Findlay*, 632.
2. A COMMON RECOVERY, WHETHER VALID OR VOID, works a forfeiture of the particular estate. *Id.*

CONCEALMENT.

See ESTOFFEL, 3; FRAUD, 4.

CONFLICT OF LAWS.

1. **CONTRACTS ARE GOVERNED BY THE LAWS OF THE STATE WHERE MADE;** and by the comity of nations, rights acquired under them are not diminished by the parties passing into other states; provided no injury result to the inhabitants of the country whose aid is required to enforce such rights. *Miles v. Oden*, 177.
2. **LIENS ON LANDS AND SLAVES REMAINING IN POSSESSION OF THE OWNER** have, against third persons, no effect in Louisiana, unless duly recorded; and this rule applies equally to inhabitants of another country who come here to enforce liens given by the laws of the place whence the property is brought. *Id.*

CONSIDERATION.

See DEEDS, 6, 8; FRAUD, 2, 3.

CONSTITUTIONAL LAW.

1. **ARTICLE IV. OF THE AMENDMENTS** to the constitution of the United States has no application to proceedings under the authority of a state. *Reed v. Rice*, 122.
2. **SEARCH WARRANT, ISSUED UNDER THE PROVISIONS** of the Kentucky constitution, which provides "that no warrant to search any place or to seize any person or things, shall issue, without describing them as nearly as may be," must describe the place to be searched, the person against whom the warrant issues, and the property sought, with such certainty as to be able to identify the same. *Id.*
3. **UNCONSTITUTIONALITY OF ACT IMPAIRING OBLIGATION OF CONTRACT.**—Where an act, incorporating part of a town into a new town, provided that the latter should support its proportion of all the paupers then supported, in whole or in part, by the original town, a subsequent act, exonerating the new town from such liability, in future, is unconstitutional and void, as impairing the obligation of contracts. *Bowdoinham v. Richmond*, 197.
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See ALIMONY.

CONTEMPT.

1. **APPLICATION OF A PARTY IN CONTEMPT FOR A FAVOR**, and not for a matter of strict right, will not be granted until he has purged himself of the contempt. *Johnson v. Pinney*, 459.
2. **COMPLAINANT NEED NOT ACCEPT THE ANSWER OF A DEFENDANT IN CONTEMPT** for not answering, but if he does so without insisting on his costs, he can not afterwards object that they have not been paid. *Id.*

CONTRACTS.

1. **VOID CONTRACT IS ONE** that is a nullity, obligatory on neither party, and insusceptible of ratification. *Breckenridge v. Ormsby*, 71.

2. VOIDABLE CONTRACT is one where only one of the parties is bound, or that is the subject of confirmation. *Id.*
 3. CONTRACTS IN WRITING, BUT WITHOUT SEAL, ARE CLASSED AS PAROL CONTRACTS, and if executory, may, before breach, be altered or rescinded by subsequent verbal agreements of the parties. *Perrins v. Chessman*, 388.
 4. WAX, WAFER, OR SOMETHING CAPABLE OF RECEIVING AN IMPRESSION is, by the law of New Jersey, necessary to constitute a seal, except in instruments for the payment of money, on which a scroll, ink, or other device, affixed by way of seal, is made by the statute to have the same effect as if sealed with wax. *Id.*
 5. REPRESENTATIONS NOT INCLUDED IN WRITTEN CONTRACT.—Where a contract for the sale of a chattel is consummated by a written conveyance, previous representations amounting to a warranty, which are not inserted in the contract, can not be proved by parol in an action of assumpsit on the alleged warranty. *Reed v. Van Ostrand*, 529.
 6. CONTRACT CONSUMMATED BY WRITING is presumed to contain the whole agreement. *Id.*
 7. CONTRACT IN ALTERNATIVE—RIGHT TO ELECT.—When a party to a contract agrees to do one of two things by a given day, he has, until the day is past, the right to elect which of them he will perform; but if he allows the day to elapse without performing either, his right of election is lost. *Choice v. Moseley*, 661.
 8. AGREEMENT NOT TO SUE A CO-OBLIGOR does not operate to discharge the other obligors, and can not be given in evidence in an action against them. *Spencer v. Williams*, 711.
- See CONFLICT OF LAWS; FEMES-COVERT; INFANCY, 1, 39; LUNATICS; QUANTUM MERUIT; RESCISSION OF CONTRACTS; USURY; WAGES.

CORPORATIONS.

1. SHARES IN THE CAPITAL STOCK of an insurance company are personal property of assignable character, and any by-law of the company limiting their transfer only at the office of the company, personally, or by attorney, with the assent of the president, would be in restraint of trade, and contrary to the general law of the commonwealth. *Sargent v. Franklin Ins. Co.*, 306.
2. A PURCHASER OF SHARES OF STOCK IS ENTITLED TO A CERTIFICATE on the production of evidence of the assignment to the officers of the company and making demand therefor. *Id.*
3. AN INSURANCE COMPANY CAN NOT REFUSE TO TRANSFER STOCK on its books on the ground that the assignor is indebted to the company. *Id.*
4. DIVIDENDS DUE when notice of the assignment was received, may be retained as security for the indebtedness of the assignor to the company. *Id.*
5. AN INSURANCE COMPANY REFUSING TO TRANSFER STOCK on its books, and attaching the same as property of the former holder, is liable to the assignee in damages measured by the value of the shares at the time of the refusal, with interest. *Id.*
6. THE INCORPORATION OF TENANTS IN COMMON, to enable them to carry on more conveniently a common object, does not vest in the corporation a

title to the land previously used by the individuals for the same purpose. *Leftingwell v. Elliott*, 343.

7. **THE DEED OF A SHARE IN THE CORPORATION** does not convey the tenant's interest in common; and parol evidence is not admissible to show that such was intended. *Id.*
8. **SUBSCRIPTIONS FOR STOCK IN A CORPORATION** can not be avoided on the ground that the published estimate of the powers and capacity of the corporation are erroneous, there being no evidence of intention to deceive those subscribing on the face of the estimates. *Salem M. D. C. v. Ropes*, 363.
9. **ONE SUBSCRIBING ANOTHER'S NAME** for shares in an incorporated company, without authority so to do, does not become a member of the corporation, but he will be liable for damages in an action on the case. *Id.*
10. **THE INSOLVENCY OF SOME OF THE SUBSCRIBERS** will not deprive the corporation of its power to levy assessments, a power provided by the act to be exercised only upon the subscription for the whole amount of shares. This principle, however, may be influenced by the act of the corporation in ignoring subscriptions of the insolvent parties. *Id.*

See MUNICIPAL CORPORATIONS.

COSTS.

1. **PARTY UNNECESSARILY FILING A BILL**, without the direction of the court, where he might have had relief by petition in another suit, is not entitled to costs. *De La Vergne v. Evertson*, 411.
2. **DEFENDANT SETTING UP AN UNFOUNDED CLAIM** is not entitled to costs. *Id.*

See LEGACIES, 6.

CO-TENANCY.

1. **A TENANT IN COMMON WHO SELLS GROWING TIMBER**, and receives payment therefor, is liable to his co-tenant for money had and received, the title not being involved. *Miller v. Miller*, 264.
2. **STATUTE OF LIMITATION** in such case runs from the time of the payment and not from the time of the sale. If a promissory note is given, on which payments are made, the statute runs from the payments. *Id.*
3. **A TENANT IN COMMON WHO EXPENDS MONEY** for the general benefit, may recover from a co-tenant his proportion of the expense, the title to the land not being in question. *Gwineth v. Thompson*, 350.
4. **WHERE A TENANT IN COMMON HAS MORTGAGED** his undivided interest in the common land, and a voluntary partition is afterwards made between himself and his co-tenants, he releasing to them his interest in the part assigned to them, the mortgage remains a lien at law on their part, and they are necessary parties to a suit for foreclosure. *In the Matter of Howe*, 395.
5. **CO-TENANTS OF THE MORTGAGOR HAVE AN EQUITABLE RIGHT**, in such case, to have the portion set apart to him in the division sold to satisfy the mortgage, or, if it has been sold, to have the proceeds so applied. *Id.*
6. **TENANT IN COMMON HAVING RENTED HIS CO-TENANT'S HALF** of the premises is not liable for double rent for holding over after the expiration of

the term, and after notice to quit, where he has previously offered his co-tenant possession of half. *Mumford v. Brown*, 461.

See CORPORATIONS, 6, 7.

COURTS OF ERROR.

See APPEALS.

COVENANTS.

1. SEISIN is a *nomen generalisimum*, and means *ex vi termini*, the whole legal title, and a covenant of seisin is consequently broken if the covenantor have not the possession, the right of possession, and the right or legal title. *Fitzhugh v. Croghan*, 139.
2. COVENANTS FOR GENERAL WARRANTY or for quiet enjoyment, are essentially and exclusively prospective, and can not be broken without eviction. *Id.*
3. COVENANT OF SEISIN IS BROKEN the instant it is made, or never, and the rights of the parties in an action for breach of the covenant, must be determined by the condition of the title at the date of the covenant. *Id.*
4. COVENANT OF SEISIN is no covenant against incumbrances, consequently a mortgage, right of dower, or other equitable lien on land, is no breach of such a covenant. *Id.*
5. EVICTION IS NOT PER SE evidence of a breach of a covenant of seisin, but if at the date of such covenant the lands have been in the adverse possession of a stranger for the period required by the statute of limitations, there is a breach. *Id.*
6. COVENANT TO PAY A SUM OF MONEY "when I collect the money due on a bond upon which suit is now pending," is broken if there is no such bond nor suit pending. *Bullock v. Pottinger*, 164.
7. COVENANT INSERTED BY FRAUD OR MISTAKE.—A covenant of warranty against all persons claiming under the grantor, inserted in a quitclaim deed by fraud or mistake, inures to the benefit of a *bona fide* purchaser from the grantee, without notice, and vests in him the original grantor's after-acquired legal title, which will not be divested by subsequent notice to the purchaser or his assigns, and such covenant will not be stricken out on a bill filed by the covenantor. *Sweet v. Green*, 442.

See DAMAGES.

CRIMINAL LAW.

1. DISCHARGING A GUN at wild fowl, with knowledge and warning that the report will injuriously affect the health of a sick person in the neighborhood, and such effect is produced by the discharge, is an indictable offense. *Commonwealth v. Wing*, 347.
2. CONDITION ANNEXED TO PARDON.—The governor may annex to a pardon a condition that a person pardoned shall leave the state and never return to it; and if he violate the terms of the pardon, he will be remitted to his former sentence, even though such sentence extends to depriving him of his life. *State v. Smith*, 679.

See ARREST; FORGERY.

DAMAGES.

DAMAGES FOR THE BREACH OF THE COVENANT OF WARRANTY by an eviction under a paramount title, which the covenantee extinguished for a nominal sum, are measured by such sum, and an allowance for trouble and expense. *Leffingwell v. Elliott*, 343.

DEBTOR AND CREDITOR.

See ASSUMPSIT, 2. 1,

DEEDS.

1. **EXECUTION AND DELIVERY** of a deed has the same effect and takes the place, in this country, of feoffments and livery of seisin. *Breckenridge v. Ormsby*, 71.
2. **DEED IS VALID BETWEEN THE PARTIES THERETO**, without attestation, acknowledgment, or recordation. *Fitzhugh v. Croghan*, 139.
3. **PROOF OF DEED BY ONE WITNESS** is sufficient, as between the parties, and proof of the handwriting of one subscribing witness is sufficient, if all the witnesses are dead. *Id.*
4. **INCONSISTENT DESCRIPTION IN DEED**.—A grantee is entitled to the land up to the point called for in his deed, although the distance given does not reach to that point. *Brand v. Daunoy*, 176.
5. **A CONVEYANCE OF THE EQUITY OF REDEMPTION** of mortgaged premises by a husband to a third person in fee for the benefit of the wife, in consideration of the release of dower to the mortgagee, which conveyance is absolute in form, and expressed to be for a money consideration, is valid as against the husband's creditors. *Bullard v. Briggs*, 292.
6. **THE TRUE CONSIDERATION**, the relinquishment of dower, may be shown by parol, and if it was equivalent in value to the equity of redemption, and the transaction was honest, the conveyance is valid. *Id.*
7. **WHERE A GRANT WAS MADE OF A RIGHT** to erect a dam on the grantee's land on one side of the stream, to the grantor's land on the other, at about sixty rods below certain mills of the grantor, the erection of the dam more than sixty rods below, and its subsequent removal twenty rods higher up, but still below the sixty rods, without objection on the part of the grantor, will be presumed within the intent of the parties to the conveyance. *Boynton v. Rees*, 326.
8. **A GRANT IS NOT INVALID** because no consideration is expressed in the deed. He who seeks to avoid a conveyance as voluntary and fraudulent, must show that no consideration was paid. *Id.*
9. **RESERVATION IN DEED**.—The owner of land having leased a stone quarry thereon for a term of years, conveyed the land, reserving the use of the quarry until the expiration of the lease. During the continuance of the term, the lease was canceled by consent: *Held*, that this did not extinguish the reservation, but that it would continue until the end of the term. *Farnum v. Platt*, 330.
10. **BREACH OF CONDITION TO PAY GRANTOR'S DEBTS**.—Where a deed is made by a father to his son, in consideration of a covenant on the part of the grantee to maintain the grantor and pay his debts, on condition that if he fails to do so the grantor shall have a right of re-entry, the grantee may insist on having the justice of an alleged debt of the grantor estab-

- lished before paying it; but if he refuses to pay after it has been established by a board of arbitrators, there is a breach of the covenant and condition in the deed. *Jackson v. Topping*, 515.
11. IF THE GRANTEE RELIES UPON PAYMENT of the debt to prevent a forfeiture of his estate, in such case, he must prove such payment. *Id.*
 12. GRANTOR HAS AN ELECTION, in case of non-payment of a debt so established, either to insist upon the forfeiture, or to waive that remedy until an attempt has been made to enforce payment by action. *Id.*
 13. AFTER JUDGMENT ON THE AWARD, which remains unsatisfied, the grantor may bring ejectment to enforce the forfeiture. *Id.*
 14. WHERE THE GRANTEE HAS CONVEYED the premises to another, an action to enforce the forfeiture may be brought against the latter, who merely represents his grantor. *Id.*
 15. GRANTOR'S HEIR MAY AVAIL HIMSELF OF SUCH COVENANT, upon breach thereof, after his ancestor's death, though he be not expressly named. *Id.*
 16. WHERE PART OF CONDITION PERSONAL TO GRANTOR.—Where the condition in such case is that the grantor may re-enter if the grantee neglects to pay the debts as covenanted, and suffers the grantor to be put to cost, trouble, and expense, the latter part of the condition is personal to the grantor; and, after his death, neglect to pay only need be shown to work a forfeiture. *Id.*
 17. GRAMMATICAL SENSE OF WORDS, in construing a deed, need not be adhered to, where a contrary intent is apparent from the whole instrument. *Id.*
 18. "AND" MAY BE CONSTRUED TO MEAN "OR," in a deed, where, from the whole instrument, such appears to have been the intent of the grantor. *Id.*
 19. CERTIFICATE OF THE PROOF OF A DEED by a subscribing witness, which states that the identity of such witness was proved to the satisfaction of the certifying officer by a witness who is named, without saying that the latter witness was known to the officer, is sufficient under the statute. *Jackson v. Victory*, 522.
 20. CONSTRUCTION OF RESERVATION IN DEED. — Where a conveyance reserves two hundred acres, "to be taken off in a convenient, compact form from the south-west corner" of a tract, the land should be taken in a square, unless peculiarly inconvenient from the situation of the land, and should be bounded by the south and west boundaries of the larger tract. *Id.*
 21. TO CONVEY A CHATTEL INTEREST a seal is unnecessary. *Reed v. Van Ostrand*, 529.

See AGENCY, 6; EVIDENCE, 6; PRIVIES; RECORDING.

DETINUE.

See NEGOTIABLE INSTRUMENTS, 1.

DEVISES.

See CHAMPERTY; LEGACIES; REMAINDERS.

DISSEISIN.

1. DISSEISIN IN FACT divests the seisin of the original owner, and deprives

him of all right in relation to the land, except the right of entry and of property, which may be further reduced to a mere right of action, and displaces all estates depending on the original seisin. *Varick v. Jackson*, 571.

2. **DISSEISIN BY RELATION** is where the owner elects to consider himself dis-seised for the sake of the remedy by *novel disseisin*. *Id.*
3. **DISSEISIN IN FACT** exists only where there is a wrongful entry by one claiming the freehold and an actual ouster of the true owner, or some act tantamount thereto, as by a common law conveyance with livery of seisin by one actually seised of an estate of freehold, or in lawful possession representing the freeholder, or by a common recovery and judgment for the freehold, with actual livery of seisin by the execution, or by levying a fine. *Id.*
4. **ONLY GRANTOR'S RIGHTS ARE DIVESTED BY CONVEYANCE** which is not a common law conveyance with livery of seisin. *Id.*
5. **HOLDING OVER OF A TENANT FOR LIFE**, after his estate is determined, under a claim of the fee, is not a disseisin of the true owner. *Id.*
6. **MERE ADVERSE POSSESSION**, not amounting to a disseisin, does not prevent the owner from devising. *Id.*

DIVORCE.

DIVORCES HAVING BEEN GRANTED BY THE GENERAL ASSEMBLY from the earliest times, can now be viewed in no other light than as a regular exercise of legislative power. *Crans v. Meginnis*, 237.

See ALIMONY.

DOVES.

See ANIMALS FERE NATURE.

DOWER.

1. **WHEN WIFE BARRED OF.**—A wife who elopes from her husband and lives in adultery, is barred of her dower; and if she is compelled to leave her husband, but refuses to return when he offers to take her back, and she afterwards lives in adultery, she is barred of dower. *Bell v. Neely*, 686.
2. **THE FACT OF ADULTERY MAY BE TRIED** on the widow's application for dower. *Id.*

DURESS.

CONTRACT, WHEN AVOIDED ON GROUND OF.—It is only in cases where the arrest is made without sufficient cause, or lawful authority, or where an improper use has been made of it, and an advantage gained thereby, that a party can avoid his contract on the ground of duress. *Meek v. Atkinson*, 653.

EASEMENTS.

1. **WHERE THE WAY COMMONLY USED IS CLOSED** by the act of the owner of the land, the way not being limited or defined, the one having the easement may pass to and fro in the manner least prejudicial to the owner. *Farnum v. Platt*, 330.

2. A TURNPIKE CORPORATION may make any use of the land on which it has an easement, necessary for the enjoyment of its franchise. It may, therefore, erect a house for its toll-gatherer, cut down trees, and dig a cellar and well for the accommodation of the house, on land over which the turnpike runs, without being liable in trespass to the owner of the land. *Tucker v. Tower*, 350.
3. RIGHT OF WAY BY PRESCRIPTION.—To establish a right of way by prescription, the use must be shown to have been adverse to the owner of the land. *Rowland v. Wolfe*, 651.

EJECTMENT.

See DEEDS, 13.

EQUITY.

1. COURT OF EQUITY CAN NOT SET ASIDE a common law judgment by decreeing a new trial peremptorily; but upon it being determined that a new trial is proper, the way to enforce its decree is by operating upon the person of the defendant by attachment, sequestration, and the like. *Hunt v. Boyer*, 116.
2. JUDGMENT AT LAW HAVING BEEN SATISFIED, equity has no power to compel the amount paid to be refunded. A judgment remaining unreversed or unaffected by a new trial, secures to the creditor the money collected thereon, and he can not be compelled to refund the same, unless obtained fraudulently. *Id.*
3. EQUITY MAY DIRECT A NEW TRIAL in an action at law, where the common law judge would, but sufficient reason must be alleged and proved why the application is not made to the latter, and absence on private business is not sufficient. *Id.*
4. A COURT OF EQUITY HAS THE POWER, and will make every possible effort within the range allowed by the statute of frauds, to heal the infirmities of defective contracts of every description that can be sanctioned by the law. *Aldridge v. Weems*, 250.
5. EQUALITY AMONG CREDITORS is equity. *De La Vergne v. Evertson*, 411.
6. FUND NOT DISTRIBUTED WHERE ALL PARTIES NOT BEFORE THE COURT.—A fund in court will not be distributed where all the parties interested are not before the court; but the right of the parties before the court, as between themselves, may be decided, if they so wish, without prejudice to the claims of persons interested who were not made parties. *Id.*
7. BILL REACHING DEBTOR'S EQUITABLE ESTATE.—After a return of his execution unsatisfied, a creditor may reach his debtor's equitable estate, either by filing a bill in his own name, or in behalf of himself and all other creditors in a like situation who may choose to come in under the decree, or by joining in a suit with such other creditors. *Edmeston v. Lyde*, 454.
8. CREDITOR OBTAINS A SPECIFIC LIEN on the equitable estate of the debtor in such a case, not by the return of his execution unsatisfied, but by commencing his suit afterwards. *Id.*
9. SUBSEQUENT ASSIGNMENT by the debtor does not divest the lien so acquired. *Id.*
10. FRAUDULENT ASSIGNEE MUST BE A PARTY, WHEN.—Where a debtor has fraudulently assigned property, so that he has no legal or equitable

claim against the assignee, the latter must be made a party to the suit to reach such property. *Id.*

11. **ASSIGNEE NEED NOT BE A PARTY, WHEN.**—A legal or equitable interest retained by the debtor in such a case, may be transferred to the complainant or to a receiver under the decree of the court, and the assignee need not be a party. *Id.*
12. **WHAT PROPERTY MAY BE SOLD UNDER DECREE.**—Every species of property of a debtor, including debts, choses in action, and equitable rights, may be reached and sold under a decree of this court, and the purchaser will be protected. *Id.*

See **APPEALS**, 6; **BILLS OF PEACE**; **EXECUTORS AND ADMINISTRATORS**, 5, 6, 7; **JUDGMENTS**, 22, 24, 25, 26.

ERRORS.

See **APPEALS**.

ESTATES OF DECEASED PERSONS.

1. A **SECOND ORDER OF SALE** of real estate may be made by the orphans' court, when the estate sold under the first order proved to be insufficient to pay all the debts of the estate. *Liddel v. McVickar*, 369.
2. **ORDER OF SALE** of real estate may be made to pay money advanced by the administrator, in good faith, for the payment of the debts of the estate. *Id.*
3. **TIME WITHIN WHICH ORDER FOR SALE** of real estate must be applied for by the administrator is not fixed by law; it is left to the discretion of the orphans' court, and is to be determined by the circumstances of the particular case. *Id.*
4. **QUESTION OF TITLE** to real estate can not be passed upon by orphans' court. *Id.*
5. **RIGHT OF THE HEIRS TO THE LAND** is as absolute as that of their ancestor, until divested by a sale by the administrator, under an order of the orphans' court. *McCoy v. Scott*, 640.

ESTOPPEL.

1. **ONE IS ESTOPPED TO PLEAD A PRESCRIPTIVE RIGHT** to flow land to a complainant under the statute for an increase of damage resulting from such flowing, the yearly damage having been ascertained in a prior action, and the defendant ordered to pay the same. *Adams v. Pearson*, 290.
2. **THE DEFENDANT IS ESTOPPED TO PLEAD** that the plaintiff has sustained no damage or no increased damage since the former judgment, as that is a question for the jury. *Id.*
3. **THE SILENCE OF THE OWNER OF LAND**, in regard to injury which he suffers from a dam on the land of another about to be purchased by a third person, is not such a concealment as will deprive him of his right of action against such third person for injury received subsequent to the purchase; the injury likely to be occasioned by a continuance of the dam being self-evident. *Alexander v. Kerr*, 616.

See **TRUSTS**, 3.

EVIDENCE

1. COUNTY CLERK'S CERTIFICATE of the county in which the land was at the date of the deed, but not at the date of its record, is not such an authentication as will authorize the deed to be used as evidence of title. *Garrison v. Haydon*, 70.
2. COURT'S NOTICE, EX OFFICIO, the fluctuations and mutations in language. *Vanda v. Hopkins*, 92.
3. RECORD IN AN ACTION can not be used against a party, when it appears that if such party had been successful he could not have used the same to defend himself. *Fitzhugh v. Croghan*, 139.
4. TESTIMONY OF WITNESS WHO, FROM INADVERTENCY, WAS NOT SWORN, before testifying in the cause, is wholly illegal and inadmissible in evidence, although the witness, at the time of giving such testimony, believed that he had been duly sworn. *Haraks v. Baker*, 191.
5. VERDICT RENDERED UPON SUCH TESTIMONY will be set aside. *Id.*
6. PAROL EVIDENCE OF USAGE is admissible to explain the terms of a deed. *Farrar v. Stackpole*, 201.
7. WHERE THE EVIDENCE IS CONTRADICTORY, it is the unquestionable and exclusive right of the jury to determine the facts. *Pearson v. Dennell*, 213.
8. THE DECLARATIONS OF ONE WHO IS A COMPETENT WITNESS are not admissible to charge another. *Baker v. Briggs*, 311.
9. DECLARATIONS OF ONE INTERESTED in land under a written agreement are not admissible, concerning the terms of such agreement, without evidence of the loss of the instrument. *Boynton v. Rees*, 326.
10. MATTER OF JUSTIFICATION OR EXCUSE IN ACTION OF TRESPASS for breaking and entering plaintiff's house can not be given in evidence under the plea of not guilty. Such matter must be specially pleaded. *Carsen v. Wilson*, 368.
11. PAROL EVIDENCE OF DECLARATION, WHEN ADMISSIBLE.—Where an executor brings suit to recover rent from a person who was in possession for a number of years, parol evidence of the testator's declarations that such person was to pay no rent, is admissible. *Cox v. Baird*, 386.
12. PAROL EVIDENCE IS NOT ADMISSIBLE to contradict, alter, or vary a written instrument, but such evidence is admissible to show that such written instrument never had an existence. *Perrine v. Cheeseman*, 388.
13. DECLARATIONS OF AGENT AS EVIDENCE.—In an action against a vendor for the sale of a spurious article of merchandise, declarations of the agent who effected the sale, made subsequently to other purchasers of portions of the same lot of merchandise, are competent evidence. *Welsch v. Carter*, 473.
14. SHERIFF'S DEED IS INADMISSIBLE as evidence of title without proof of the judgment and execution. *Buck v. Aikin*, 535.
15. MASTER'S TESTIMONY THAT A VOYAGE WAS FAIR AND LAWFUL, and that the vessel was not engaged in illicit trade, states a matter of fact and not of law. *Per Walworth, Ch., and Spencer, senator. Ocean Ins. Co. v. Francis*, 549.
16. GENERAL EVIDENCE OF THE TRUTH OF A WARRANTY OF NEUTRALITY throws the burden upon the other party to falsify the warranty. *Per Walworth, Ch., and Spencer, senator. Id.*

17. PAROL PROOF OF THE CONTENTS OF A PAPER, alleged to be lost, is admissible where the evidence warrants a reasonable presumption that it was deposited with an officer of the court, and he testifies that after careful and diligent search he can not find it. *Per Walworth, Ch. Id.*
 18. LAW OF NATIONS IS JUDICIALLY NOTICED by the courts of all civilized countries. *Per Walworth, Ch. Id.*
 19. FOREIGN MUNICIPAL LAWS MUST BE PROVED like other facts. *Per Walworth, Ch. Id.*
 20. EXCEPTIONS TO INTERROGATORIES, annexed to a commission to take testimony, may be taken at the trial. *Per Spencer, senator. Id.*
 21. PARTY ELBOTING TO CALL A WITNESS WHO IS INTERESTED ADVERSELY to him, for examination upon a particular point, admits his credibility, and the other party may examine him generally. *Varick v. Jackson, 571.*
 22. EVIDENCE THAT AN INVENTION WAS USELESS, and of no value, can not be given under the general issue pleaded to an action on a promissory note given for a certain patent right of the payee. *Williams v. Hicks, 693.*
 23. ON THE TRIAL OF AN INDICTMENT FOR AN ASSAULT, the defendant can not give evidence, in mitigation of the fine, that the prosecutor was on bad terms with him, and had on days previous to the assault used provoking and abusive language of and to him. *Rawlings v. Commonwealth, 757.*
- See DEEDS, 6; INSURANCE, FIRE, 2; JUDGMENTS, 16, 17, 18, 19; REPLEVIN, 5; WILLS.

EXCEPTIONS.

See APPEALS, 7.

EXECUTIONS.

1. POSSESSION, HOW OBTAINED.—A sale of land by *f. fa.* does not, like the execution of a *hab. fa.*, transfer the actual possession. It only gives the right to acquire the debtor's possession, and if the latter or a stranger is in possession when the land is sold under *f. fa.*, neither the sheriff nor court on motion can give the purchaser possession, but he must obtain the same by ejectment. *Morton v. Sanders, 128.*
2. REPLEVIN IS A REMEDY COEXTENSIVE with trespass *de bonis asportatis*, and lies against an officer by a stranger to an execution, whose property has been seized under color of process. *Philips v. Harries, 166.*
3. DEFENDANT IN EXECUTION is guilty of a contempt of court, if he institutes an action of replevin to recover property levied on by virtue of the writ. *Id.*
4. FINDING OF A JURY AGAINST A CLAIMANT, on trial of right to property, exempts the officer levying on the same from liability for the value thereof, but does not exempt him from an action by the real owner for wrongful taking and detention or abuse of property before sale. *Id.*
5. SALE MADE UNDER LEVY ON PROPERTY not belonging to the defendant in execution, confers no right on the purchaser. *Ballio v. Poisset, 185.*
6. WHERE A SUBSEQUENT ATTACHING CREDITOR ACTS AS AUCTIONEER at the sale of the premises levied upon under a prior execution, and does not disclose that he has levied on the same premises, and the officer's return stated that he had advertised the place of sale, which was not true, the attaching creditor having obtained judgment, may maintain an action

- against the sheriff for a false return and recover the amount of his judgment and interest, that being less than the sum realized on the execution sale. *Whitaker v. Sumner*, 298.
7. THE AUCTIONEER AT AN EXECUTION SALE is not bound to disclose his interest in the premises under his attachment. *Id.*
 8. AN OFFICER'S RETURN IS CONCLUSIVE on all questions that can arise between the creditor and debtor, and all persons claiming under either of them. *Id.*
 9. WHERE THE OWNER OF CHATTELS MIXES THEM with those of another so that they can not be distinguished, an officer will not be liable in trespass for attaching them as the property of that other. *Shumway v. Butler*, 340.
 10. SAME.—But if the officer sells, after notice and a demand for redelivery, he will be liable for conversion. *Id.*
 11. SAME.—If the owner exhibits to the officer a bill of sale of articles mixed with others of the same kind, so as to be indistinguishable, the officer will be justified if he selects and gives the least valuable articles corresponding with the bill of sale. *Id.*
 12. JUDGMENT-CREDITOR MAY RECOURSE TO EQUITY, WHEN.—A judgment-creditor, having proceeded to execution, may resort to equity to reach property not in itself liable to execution. *Candler v. Pettit*, 399.
 13. INJUNCTION AGAINST THE DEBTOR'S DISPOSING OF HIS PROPERTY lies in such a case, after the return of the execution unsatisfied. *Id.*
 14. EQUITABLE RELIEF AGAINST OBSTRUCTION TO EXECUTION.—A creditor having obtained a specific lien on property subject to execution, by issuing his execution, may file a bill here to remove a fraudulent obstruction to the sale. *Beck v. Burdett*, 436.
 15. PROPERTY NOT SUBJECT TO EXECUTION AT LAW can be reached in equity only by the creditor's showing that his legal remedies are exhausted by an actual return of his execution unsatisfied. *Id.*
 16. BILL FILED BEFORE THE ACTUAL RETURN of the execution, in such a case, is premature. *Id.*
 17. SPECIFIC LIEN ON PROPERTY NOT LIABLE TO EXECUTION is not obtained by the issuing or return of an execution, but only by filing a bill in equity after the execution is returned unsatisfied. *Id.*
 18. A SHERIFF HAVING AN EXECUTION against a defendant can not discharge the latter from liability to the plaintiff, by giving to the defendant a receipt for the amount of the judgment in consideration of the settlement of a private indebtedness due from the sheriff to the defendant. *Miles v. Richwine*, 639.
 19. RIGHTS OF SENIOR EXECUTION CREDITORS—INDEMNITY TO SHERIFF.—The rights of a senior execution-creditor will not be postponed to those of a junior execution-creditor, because the latter gave an indemnity to the sheriff, which the former refused to give; a plaintiff in execution is not bound to give indemnity to the sheriff, although the defendant's title to the goods levied on is contested by third persons. *Adair v. McDaniel*, 664.
 20. DELIVERING EXECUTION TO ANOTHER OFFICER.—Where a sheriff receives an execution to levy and return according to law, and without the creditor's consent delivers the same to a deputy, and informs the debtor that the writ is out against him, who, in consequence of the information,

avoids the service of the writ, such officer is liable in damages for not serving and returning the writ. *Isham v. Eggleston*, 714.

21. **IDEM.**—Whether the sheriff performed the service himself, or procured it to be done by another officer, to whom it was directed, would be of no importance; for if performed by any one in the manner required by law, and without prejudice to the plaintiff, it would be a complete answer to the action. *Id.*
22. **IDEM.**—IN AN ACTION AGAINST THE OFFICER for failing to serve and return the writ, the creditor may show, without any allegation to that effect in his declaration, that the execution failed of service, that he has sustained damage by reason of the defendants not retaining the execution in his hands, or in consequence of some act or omission of duty in regard to it, for which he would have been liable if he had retained it. *Id.*
23. **EXEMPT FROM ATTACHMENT AND EXECUTION** are butter made from the debtor's only cow, and a time-piece. *Leavitt v. Metcalf*, 718.
24. **GROWING CROPS.**—As between the mortgagee of land, who purchases at the foreclosure sale, and execution creditors of the mortgagor, in possession, the former is entitled to the growing crops. *Crews v. Pendleton*, 750.
25. **AN INJUNCTION LIES** to protect the interest of a purchaser at a foreclosure sale before it has been confirmed, as against the execution sued out by the creditors of the mortgagor. *Id.*

See EQUITY, 8, 12; FRAUD, 5; FRAUDULENT CONVEYANCES, 3; SHERIFFS, 1.

EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATOR MAY PURCHASE AT HIS OWN SALE**, and the same is not *per se* void, but it is *prima facie* valid, it appearing that the sale was public and that there had been no unfairness in the same. *Brannan v. Oliver*, 37.
2. **SALE OF LAND IN ANOTHER STATE**, without an order of court, will not be held invalid, it not appearing that such order was required by the laws of the state where the sale was made. *Id.*
3. **ADMINISTRATRIX MARRYING THE OBLIGOR IN A BOND** payable to her, in her representative capacity, does not thereby extinguish the debt, but merely suspends the right of action during coverture and while she continues administratrix. *King v. Green*, 46.
4. **BOND, PAYABLE TO AN ADMINISTRATOR** as such, is assets in the hands of an administrator *de bonis non*. *Id.*
5. **AN ADMINISTRATOR'S REMEDY IS IN EQUITY** where, having been compelled to pay a debt of his decedent of which he was not aware when he distributed the estate, he seeks to recover from the distributee the amount of such debt. *Turner v. Egerton*, 235.
6. **THE REMEDY AGAINST AN EXECUTOR** who sells the right of redemption in lands devised subject to a mortgage, instead of redeeming, as directed by the testator, is not by a bill in equity, at the suit of the devisee, but at law for damages. *Jennison v. Hapgood*, 258.
7. **IDEM.**—But if the executor sells to himself through the medium of an agent, the bill will lie. *Id.*
8. **EXECUTORS HAVE NO POWER TO REDEEM MORTGAGES** out of the state in which they are appointed. *Havens v. Foster*, 353.

9. CORRECTION OF MISTAKE IN ADMINISTRATOR'S ACCOUNT.—Where an omission has by mistake been made in an administrator's account, on a sufficient showing made to the court, the omission may be supplied and the mistake corrected in his subsequent or final account. *Liddel v. McVicker*, 269.
10. ITEMS OF ACCOUNT IN ORPHANS' COURT may be expressed in general terms. *Id.*
11. ORPHANS' COURT MAY ALLOW ADMINISTRATOR INTEREST on sums advanced by him, in good faith, to the estate, especially if such advances were beneficial to the estate. *Id.*
12. WHERE THE ADMINISTRATOR HAS SOLD THE PART OF THE REAL ESTATE to which he was entitled as one of the heirs, the orphans' court should not order the part so conveyed by him to be sold for payment of a debt due to him for advances made to the estate. *Id.*
13. EXPENSES OF JUDGES CAN NOT BE ALLOWED BY ORPHANS' COURT, beyond what the statute allows; but the court may allow reasonable counsel fees. *Id.*
14. RELEASE OF A DEBT BY TWO ADMINISTRATORS, against the will of a third, is valid. *Murray v. Blatchford*, 537.
15. EXECUTORS AND ADMINISTRATORS STAND ON THE SAME GROUND, with respect to their responsibilities, rights, and powers. *Id.*
16. WHERE ONE COLLUDES WITH AN EXECUTOR to produce a *devastavit*, parties interested in the estate may pursue property into his hands. *Id.*
17. COLLUSION IS ANY INTERMEDDLING WITH THE EXECUTOR or the assets, whereby the executor is guilty of a violation of duty. *Id.*
18. WHERE ONE THIRD OF THE DISTRIBUTORS OPPOSE A RELEASE or compromise of a debt by the administrators, but no fraud or collusion is shown, such release will not be set aside. *Id.*
19. ADMINISTRATOR'S SALE OF REAL ESTATE.—An administrator's sale of the real estate of a decedent is void unless made by virtue of an order of court; and the existence of such an order must appear as a matter of record, and can not be proven in any other way. *Goforth v. Longworth*, 588.
20. BOND OF OBLIGOR WHO BECOMES ADMINISTRATOR OF THE OBLIGEE is thereby suspended, and the debt becomes assets in his hands as administrator. *Bigelow v. Bigelow*, 591.
21. DISCOVERY OF WILL AND APPOINTMENT OF EXECUTOR repeal grant of administration, but do not avoid all *mesne* acts. *Id.*
22. AN ADMINISTRATOR CAN NOT RECOVER BACK MONEY which he has paid to a creditor of his intestate, on account of a just debt, where a deficiency subsequently arises, not attributable to accidental failure of assets. *Carson v. McFarland*, 627.
23. AN ADMINISTRATOR HOLDS THE RENTS and profits of the real estate of his intestate, as trustee for the heirs, not for the creditors. *McCoy v. Scott*, 640.
24. DECREE OF ORDINARY, REQUISITES OF.—A decree of the ordinary, which adjusts the accounts of an administrator and determines the amount due, is sufficient, without ordering such amount to be paid. *Lyles v. McClure*, 648.
25. EXTENT OF ORDINARY'S JURISDICTION.—The ordinary has authority

- merely to settle accounts, but has no power to compel payment of the amount found due. *Id.*
26. THE COURTS OF LAW WILL NOT ENTERTAIN ACTION ON ADMINISTRATION BOND until the state of the account is ascertained by decree of the ordinary. *Id.*
27. ACQUIESCENCE IN DISCRETION OF ORDINARY SETTLING ACCOUNT of administrator warrants the presumption that all matters properly cognizable before him, were there adjusted and settled. *Id.*
28. ADMINISTRATOR DE BONIS NON can not maintain an action for the price of goods of the intestate sold by the first administrator. *Ross v. Sutton*, 660.
29. PRIVACY.—There is no privity of contract between the debtor of the first administrator and the administrator *de bonis non*. *Id.*
30. ALL ACTS OF ADMINISTRATOR DONE IN DUE COURSE OF ADMINISTRATION are valid and binding upon the estate, though his letters be afterwards revoked, and though the administration had been obtained by fraudulently suppressing a will. *Foster v. Brown*, 672.
31. TROVER CAN NOT BE MAINTAINED AGAINST SUCH ADMINISTRATOR, by the executor, for goods of the testator to which the administrator had regularly acquired title during the continuance of his administration; the proper course, in such a case, is to compel the administrator to account. *Id.*
32. AN ADMINISTRATOR SELLING THE CHATTEL OF ANOTHER, as part of his intestate's estate, and applying the proceeds in payment of the debts of the estate, without notice of the rights of the true owner, is personally liable in trover by such owner. *Newsum v. Newsum*, 739.

See ESTATES OF DECEASED PERSONS, 2, 3, 5; LEASES, 2.

FACTORS.

1. WHERE A DEL CREDERE COMMISSION is paid to a factor, his agreement to guaranty the sales may be proved by parol. *Swan v. Nesmith*, 282.
2. THE LIEN OF A FACTOR IS A PERSONAL PRIVILEGE, and can not be set up by a third person as a defense to an action by the principal. *Holly v. Huggefurd*, 303.
3. WHERE A FACTOR SELLS PERSONALTY of his principal, and subsequently takes it back at a reduced figure on account of a defect, and charges the same to his principal, the latter has sufficient property therein to maintain trespass against one who takes it from the factor's possession. *Id.*
4. FACTOR CAN NOT BIND HIS PRINCIPAL by submitting to arbitration a claim for damages arising out of an alleged breach of an implied warranty of the quality of the thing sold. *Carnochan v. Gould*, 668.

FALSE IMPRISONMENT.

See ARREST.

FEMES-COVERT.

CONTRACTS OF FEMES-COVERT are void. *Breckenridge v. Ormsby*, 71.

See EXECUTORS AND ADMINISTRATORS, 3; HUSBAND AND WIFE; INFANCY, 4.

FIXTURES.

1. **PROPERTY IN ITS NATURE PERSONAL**, when fitted and prepared to be used with real estate, and necessary for its beneficial use, becomes a part of the realty, and, if on the premises at the time of the conveyance, passes by deed of such realty. *Farrar v. Stackpole*, 201.
2. **CONVEYANCE OF SAW-MILL WITH APPURTENANCES** conveys the mill-chains, dogs and bars, in their proper places in the mill at the time of the execution of the deed. *Id.*

FOREIGN JUDGMENTS.

See JUDGMENTS.

FORGERY.

1. **FRAUDULENT ALTERATION OF SATISFIED ORDER BY DRAWER NOT FORGERY**.—An alteration of the date of an order for the delivery of goods, made by the drawer with fraudulent intent, after the order has been satisfied and returned to him, is not forgery. *People v. Fitch*, 477.
2. **ACTUAL PERPETRATION OF A FRAUD** is not necessary to constitute forgery. An intent to defraud is enough, if the act tends to effectuate the fraud. *Id.*

FRAUD.

1. **FRAUD OR MISTAKE IN THE EXECUTION** of a written contract may be proved by parol, but such fraud or mistake should be alleged in the bill, and clearly proved. *Fishback v. Woodford*, 55.
2. **EVIDENCE OF A DIFFERENT CONSIDERATION** than the one expressed in the writing, is not sufficient evidence of fraud or mistake to avoid a contract. There must be some substantive fact established independent of the consideration, before the contract will be set aside. *Id.*
3. **PROOF OF PAPER CONSIDERATION OF A NOTE** for dollars, does not per se prove a mistake or fraud. *Id.*
4. **CONCEALMENT OF HIS INSOLVENCY BY A PURCHASER** of goods, who obtains possession without intending to pay for them, is a fraud, and the property does not pass. *Durrell v. Haley*, 444.
5. **PURCHASE OF GOODS BY AN INSOLVENT**, with a view to subjecting them to an execution which has been issued immediately after a confession of judgment to a friend, is a fraud, and the execution creditor will not be permitted to hold the goods. *Id.*

See **BONA FIDE PURCHASERS**, 1, 2, 5; **PLEADING AND PRACTICE**, 17.

FRAUDULENT CONVEYANCES.

1. **FRAUDULENT SALE OF LAND**.—The conduct of parties to a sale, before and after, as well as at the time of a sale, may be inquired into for the purpose of ascertaining whether or not such sale was *bona fide*. *Reels v. Knight*, 184.
2. **RETENTION OF POSSESSION ON SALE OF PERSONALTY** renders the sale invalid as to creditors. *Batchelder v. Carter*, 707.
3. **SHERIFF'S SALES ON EXECUTION**, where all is in good faith, form an exception to this rule. But an auction sale by a sheriff, made by agreement

of parties without previous advertisement, nor under a legal precept warranting it, is not a sheriff sale within the exception. *Id.*

See ASSIGNMENT, 4, 5, 6.

GARNISHMENT.

ONE SUMMONED AS TRUSTEE, WHO WAS INDEBTED TO THE DEFENDANT at the time of the service of the writ, but who is obliged, before making his answer, to pay a note of the defendant's on which such trustee was indorser, may set off the amount of such note against the debt due to the defendant in respect to which he is summoned. *Boston Type Co. v. Mortimer*, 266.

GRANTS.

GRANTS MAY BE PRESUMED from a lapse of time, and generally, whatever will toll the right of entry, will create a presumption of a conveyance of the legal title. *Fitzhugh v. Croghan*, 139.

GROWING CROPS.

See EXECUTIONS, 23, 24.

GUARDIAN AND WARD.

1. **GUARDIAN IN SOCAGE.**—At common law, where lands held in socage descended to an infant, his nearest relative, who could not possibly inherit the lands, was his guardian in socage until the age of fourteen, and until the selection of a guardian by himself, and might lawfully receive the rents and profits of the land. *Combs v. Jackson*, 568.
2. **IF THE LANDS DESCENDED FROM THE PATERNAL side**, the mother or next of kin on the maternal side was the guardian; if from the maternal side, the father or next of kin on the paternal side was the guardian. *Id.*
3. **AS TO LANDS ACQUIRED BY PURCHASE**, there could be no guardianship in socage. *Id.*
4. **LANDS GRANTED BY THE PEOPLE OF NEW YORK SINCE JULY 4, 1776**, are declared by statute to be allodial and not feudal, and there can be no guardianship in socage with respect to them. *Id.*
5. **FATHER WAS GUARDIAN BY NATURE** to his heir apparent, until his majority, at common law, where there was no guardian in socage; but his guardianship extended only to the person, and gave him no control over the property of the infant. *Id.*
6. **UNDER OUR STATUTE THE FATHER IS GUARDIAN BY NATURE** of the persons of all his children, all of them being heirs apparent, and with respect to socage lands granted before the revolution, and descending from the maternal side, he is their guardian in socage as at common law. *Id.*

HUSBAND AND WIFE.

1. **CHOSES IN ACTION**, which belonged to a woman prior to her marriage, or accrued to her during her coverture, survive to her if she survive the husband, unless reduced to possession by the latter. If the husband survive the wife, he is entitled to them under the statute of distributions. *Miller v. Miller*, 59.
2. **SURVIVING HUSBAND** who is indebted to the community, can not take from

it until he has paid the debt, unless his share amounts to more than he owes. *Ballio's Heirs v. Poisset*, 185.

See SPECIFIC PERFORMANCE, 7.

IGNORANTIA LEGIS.

1. IGNORANCE OF LAW signifies ignorance of the law of one's own country, and does not extend to foreign laws or the statutes of other states. *Haven v. Foster*, 353.
2. MONEY PAID THROUGH IGNORANCE of the law of another of the United States may be recovered back. *Id.*
3. PRINCIPLE APPLIED TO THE CASE of a niece living in Massachusetts who sold her interest in certain lands in New York left by her uncle on his death, she being ignorant that by the laws of New York lands descended *per stirpes* and not *per capita*. *Id.*

INFANCY.

1. INFANTS' CONTRACTS are voidable only. *Breckenridge v. Ormsby*, 71.
2. ANY ACT after a person becomes of age dissenting from a deed, delivered during infancy, of equal solemnity with the deed, annuls and avoids the same. *Id.*
3. RATIFICATION OF CONTRACT OF INFANT.—Where an infant purchases land and gives a mortgage thereon to the mortgagee of his vendor as a part of the consideration of the deed, a conveyance by him of said land after he becomes of full age is a ratification of the mortgage. *Dana v. Coombs*, 194.
4. PROCHIN AMI SUIING FOR INFANT.—Any one may sue in an infant's name, without his knowledge or consent, as next friend; but on proper application, the court will refer it to a master to ascertain whether the suit is for the infant's benefit, and if he reports that it is not, the proceedings will be stayed. The rule is different as to a suit brought in the name of a *feme-covert*. *Fulton v. Resevell*, 409.
5. INSOLVENT PERSON SUIING AS PROCHIN AMI for an infant will be required, on the defendant's application, to give security for costs. *Id.*
6. INFANT SUIING IN FORMA PAUPERIS.—Perhaps the court might permit an infant to sue *in forma pauperis*, if unable to indemnify a responsible person for costs; but it would first see that there was probable cause to sue, and appoint a proper person as *prochein ami*. *Id.*
7. INJURY BY INFANT TO HIRED HORSE, REMEDY FOR.—Trespass, and not case, is the proper remedy where an infant, having hired a horse, uses him with such violence and cruelty that he dies. *Campbell v. Stakes*, 561.
8. IF CASE IS BROUGHT FOR SUCH AN INJURY, it affirms the hiring, and the plea of infancy is a good defense. *Id.*
9. CONTRACT OF AN INFANT IS NOT VOID, but voidable, at his election. *Id.*
10. TRESPASS WILL NOT LIE FOR BARE NEGLIGENCE BY AN INFANT or adult to use a hired animal with ordinary care, to protect him from injury, and return him as agreed upon. *Id.*
11. WILLFUL AND POSITIVE ACT BY AN INFANT in such a case amounting to an election to disaffirm the contract, entitles the owner to immediate possession. *Id.*

12. FOR A WILLFUL AND INTENTIONAL INJURY BY AN INFANT to a horse hired by him, trespass will lie. *Id.*
13. PLEA OF INFANCY in such case, with an averment that the injury occurred through the defendant's unskillfulness and want of knowledge, discretion, and judgment in driving said animal while bailed to him, would be a good answer to the action, but without such averment, the injury will be presumed willful, and will amount to an election to disaffirm the contract. *Id.*

INJUNCTIONS.

PRIVILEGE OF COLLECTING TOLLS, WHEN SECURED IN EQUITY.—An injunction will be granted to secure a party in the enjoyment of a privilege conferred by statute, of which he is in the actual possession, his legal title being unquestioned. Hence, one maintaining a public ferry and collecting tolls, may enjoin another from having a free bridge near it for the use of the public. *Gates v. McDaniel*, 49.

See EMBODIMENTS, 13, 25; PLEADING AND PRACTICE, 12; USURY, 1, 2.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE—FIRE.

1. CORRECTION OF MISTAKES IN POLICIES of insurance, as well as in other written instruments, is within the jurisdiction of equity. *Phoenix Fire Ins. Co. v. Gurnee*, 431.
2. EVIDENCE OF THE MISTAKE must be clear and satisfactory. *Id.*
3. MISTAKE IN DESCRIPTION OF PROPERTY INSURED.—Where the memorandum drawn up by the clerk of the insurers, called for insurance on a "grist-mill," and the policy when issued was on a "mill-house," the mistake was corrected on a bill filed by the insured, after a loss, although he read over the policy before he left the office. *Id.*

INSURANCE—MARINE.

1. THE ASSURED OFFERING TO ABANDON and refusing to repair a ship stranded and greatly damaged, will entitle the insurer to repair her, if it can be done for less than half her value, and restore her to the assured. But unless the repairs are made within a reasonable time, the insurer forfeits his right to return her, and must be considered as having accepted the abandonment. *Peele v. Suffolk Ins. Co.*, 286.
2. WHETHER TO THE EXPENSE FOR REPAIRS, the jury may add the sum "for damage for leak and straining of the vessel," in order to determine the amount of damage caused by the perils of the sea, *quare*. *Id.*
3. PRELIMINARY PROOF of the interest of the assured in a lost vessel, is waived where the underwriters do not object to the sufficiency of such proof, but refuse to pay on the ground that they are not liable. *Per Walworth, Ch. Ocean Ins. Co. v. Francis*, 549.
4. ASSURED'S RIGHT OF ABANDONMENT, for an illegal capture, is not affected by the supercargo's neglect to put in a claim to the vessel. *Per Walworth, Ch. Id.*

INTEREST.

1. **MAKER OF NOTE WILL NOT BE COMPELLED TO PAY INTEREST**, where, owing to contest between adverse parties, it is uncertain whom he ought to pay; until such contest is decided he is not *in mora*. *Miles v. Oden*, 177.
2. **INTEREST RUNS** from the service of the writ, no previous demand having been made: *Haven v. Foster*, 353.

See JUDGMENTS, 8; LEGACIES, 7.

INVENTIONS.

See AGENCY, 7.

JUDGMENTS.

1. **JUDGMENT RENDERED IN VACATION**, and entered as of the preceding term, is valid, if such entry was in accordance with the agreement of parties entered in open court. *King v. Green*, 46.
2. **BILL, THOUGH CONFESSED**, yet, if its allegations are destitute of precision, no decree can be correctly rendered thereon. *Marshall v. Tenant*, 126.
3. **JUDGMENT AT LAW CAN NOT BE IMPEACHED** as fraudulent and void, by a bill in equity, when it appears that the sheriff, without combination with the plaintiff, returned process as executed, when in fact it never had been. *Taylor v. Lewis*, 135.
4. **JUDGMENT BY A COURT OR MAGISTRATE**, acting without jurisdiction, is a nullity, and is no bar to a suit subsequently instituted on the same cause of action. *Reading v. Price*, 162.
5. **JUDGMENT-CREDITORS CAN NOT PREVAIL** against a prior equity of third persons attaching to land of the debtor. *In the Matter of Howe*, 395.
6. **PAYMENT ON A JUDGMENT DISCHARGES ITS LIEN** to that extent, and a subsequent agreement of the parties can not restore it. *De La Vergne v. Evertson*, 411.
7. **ASSIGNEE OF A JUDGMENT** has no better right against third persons than the assignor. *Id.*
8. **INTEREST ON JUDGMENT**.—Prior to the act of April 13, 1813, interest on a judgment could not be levied, unless it was for a penalty, and the amount, including interest, was within the penal sum. *Id.*
9. **RESPECTIVE RIGHTS OF JUDGMENT-CREDITORS**.—Where land is sold under a mortgage, and there are several creditors having judgments subsequent to the mortgage, the oldest judgment is, as respects the others, no further a lien upon the surplus moneys than it was upon the equity of redemption. Hence, if the judgment-creditors are equitably entitled to interest, but could not have levied it on the land, the money must first be applied to the principal of the judgments, according to priority, and the residue, if any, ratably applied to the interest on said judgments. *Id.*
10. **PURCHASER UNDER A JUDGMENT** acquires all the right of the judgment-debtor in the premises, and no equity can be set up against him on account of notice which did not exist against the debtor. *Sweet v. Green*, 442.
11. **PERSON NOT A PARTY IS NOT BOUND BY THE JUDGMENT OF A FOREIGN COURT** merely because he is a subject of the government under which

- the court was organized. *Per Walworth, Ch. Ocean Ins. Co. v. Francis, 549.*
12. JUDGMENT OF A COURT OF COMPETENT JURISDICTION is conclusive upon the parties, and can not be questioned collaterally in the courts of the same country. *Per Walworth, Ch. Id.*
 13. SENTENCE OF CONDEMNATION OF AN INSTANCE COURT OF ADMIRALTY is conclusive to change the property, and the forfeiture can not be questioned collaterally in any other court of the same country. *Per Walworth, Ch. Id.*
 14. CONDEMNATION OF A VESSEL AS LAWFUL PRIZE under the law of nations, by an admiralty court, is conclusive to change the property in every collateral inquiry in other courts of the same country. *Per Walworth, Ch. Id.*
 15. SUCH CONDEMNATION IS HELD CONCLUSIVE AGAINST ALL THE WORLD, in the courts of England and the United States, and in some of the states, not only to change the property, but to preclude direct or collateral inquiry into the facts upon which it is founded in the courts of the same or any other country. *Per Walworth, Ch. Id.*
 16. IN NEW YORK, THE SENTENCE OF A FOREIGN COURT OF ADMIRALTY condemning property as lawful prize under the law of nations, though conclusive to change the property, is only *prima facie* evidence of the facts upon which it is founded, and may be rebutted by proof in a collateral action. *Id.*
 17. SENTENCE OF A FOREIGN ADMIRALTY COURT ACTING AS A MUNICIPAL COURT, and not as a prize court, condemning a vessel for a violation of navigation laws, is not even *prima facie* evidence of a breach of warranty not to engage in illicit trade contained in a policy of insurance on such vessel, without proof of the law alleged to have been violated. *Id.*
 18. TO MAKE A DECREE EVIDENCE OF THE GROUNDS upon which it is based, it must appear: 1. That the court had jurisdiction; 2. What the grounds of the decree were. *Per Spencer, Senator. Id.*
 19. DECREE, WHEN INSUFFICIENT AS EVIDENCE.—A decree pronouncing a vessel "to be forfeited and lost for a breach of some or one of the laws relating to trade and navigation" is not sufficiently precise to be entitled to credit as a judicial proceeding, and will not be aided by the libel. *Per Spencer, Senator. Id.*
 20. VIOLATION OF SOME PRECISE LAW must be established by a decree of condemnation of a foreign court of admiralty, relied upon by an insurer, to prove that a vessel was engaged in illicit trade. *Per Spencer, Senator. Id.*
 21. JUDGMENT IN REPLEVIN OBTAINED BY PARTY NOT THE OWNER OF THE PROPERTY.—Where, in a suit in replevin between two parties, neither of whom owned the property, judgment was rendered in favor of one of them, equity will compel an assignment of such judgment to the use of the real owner of the property. *Steele v. Lowry, 581.*
 22. RELIEF FROM JUDGMENT AT LAW.—The fact that a plaintiff has prosecuted a groundless action at law, which involved him in a heavy responsibility, furnishes no ground for relief in equity. *Low v. Lowry, 585.*
 23. DECREE OF COURT OF COMPETENT JURISDICTION can not be impeached collaterally. *Bigelow v. Bigelow, 591.*

24. ACTUAL PAYMENT DISCHARGES A JUDGMENT at law, but not in equity, if justice require that it should still subsist. *Fleming v. Bower*, 622.
25. JUDGMENT-CREDITORS may, in equity, come upon the equitable estate of their debtor, in real estate, in the order of the date of their judgment, the oldest having priority. *Haleys v. Williams*, 743.
26. IN EQUITY, JUDGMENTS ARE LIENS on the whole of the debtor's equitable estate; and the whole is first to be applied to the elder judgment, then the whole of the residue to the junior judgment. *Id.*

See APPEALS, 1, 2, 4; EQUITY, 1, 2; SURETSHIP, 5, 6.

JUDICIAL SALES.

See CHAMPERTY.

JURISDICTION.

THE SUPREME COURT, AS A COURT OF CHANCERY, has no jurisdiction to re-settle an executor's account. An injured party's remedy is by appeal; or if the proceedings in the probate court are void for fraud, the executor should be cited to account in the probate court. *Jennison v. Hapgood*, 258.

JURY.

JURY MAY FROM THEIR KNOWLEDGE of the business of society and the value of labor, in assumpsit for work and labor, find a verdict for the price of the work done notwithstanding there is no evidence of the worth of labor at the time and place the work was performed. *Craig v. Durrell*, 103.

See VERDICT.

LANDLORD AND TENANT.

See LEASES.

LARCENY.

See ANIMALS FERE NATURE.

LEASES.

1. A RESERVATION IN A LEASE of a brick-kiln and yard, giving to the lesser the option to take bricks from time to time at a fair market-price, in lieu of the rent, does not vest property in the bricks in the lessor until he makes his election. *Wait, Appellant*, 262.
2. *IDEM*—If THE LESSOR DIES, and his administrator enters in his inventory the number of bricks on hand as a part of the estate which proves insolvent, he will be liable for the value of the bricks which he permits the lessor thereafter to take in lieu of rent. *Id.*

See CO-TENANCY.

LEGACIES.

1. DEVISE CONDITIONED ON PAYING LEGACIES.—Where, after a devise to another for life, land is devised to one in fee, provided that he pay the legacies given by the will, and the legacies are directed to be paid by the devisee, his heirs, executors, etc., on his or their coming into possession,

the payment of the legacies is a condition of the devise, and upon the refusal of the devisee or his heirs to accept the devise and pay the legacies, the land descends to the testator's heirs, chargeable in equity, however, with payment of the legacies. *Birdsall v. Hewlett*, 392.

2. DEVISEE BECOMES PERSONALLY LIABLE for the legacies, upon accepting such devise. *Id.*
3. SUCH LEGACIES REMAIN CHARGEABLE ON THE LAND, notwithstanding the devisee's personal liability. *Id.*
4. LEGACIES CHARGED ON LAND LAPSE, WHEN.—The general rule is that legacies chargeable on land, and payable *in futuro*, are not vested, and lapse upon the legatee's death before the day of payment. *Id.*
5. LEGACY DOES NOT LAPSE, WHEN.—Where land is devised upon the express condition of the payment of a legacy, the time of payment being postponed for the benefit of the estate without reference to circumstances relating to the legatee, the legacy vests upon the testator's death, and does not lapse upon the death of the legatee before the time of payment. *Id.*
6. COSTS OF A SUIT TO RECOVER A LEGACY charged on land in the hands of a devisee, where payment is refused, become also a charge on the land. *Id.*
7. LEGACY DRAWS INTEREST from the time it becomes payable. *Id.*

LIBEL.

1. OFFENSIVE WORDS are not libelous. *Robbins v. Treadway*, 152.
2. PUBLICATION THAT CHARGES A JUDGE with being destitute of the capacity and attainments necessary for his station, or that he openly abandoned the common principles of truth, or that he sold, directly or indirectly, the appointment of clerk, is libelous. *Id.*
3. PUBLICATION THAT CHARGES A JUDGE WITH IMPROPRIETIES, which would be no cause of impeachment or address, is no more actionable than if made against a private citizen. *Id.*

LICENSE.

- A LICENSE TO CUT TIMBER on the grantor's land is not assignable. *Emerson Fisk*, 206.

LIENS.

1. SPECIFIC LIEN having been imposed on certain particular property, by mortgage or otherwise, by a debtor to secure the payment of a specific debt, equity will not permit such debtor to be harassed by his creditor's creditor until such property has been disposed of, and a deficiency shown. *Marshall v. Tenant*, 126.
2. OWNER OF LAND HAS A LIEN ON THE TIMBER cut on and removed from the land, where the contract under which the cutting and removal were done provides that he shall retain the sole ownership of the timber until he receives the proportion thereof allowed to him for stumpage, and is paid all moneys due to him for advances made to the other parties to the contract; and where it is provided that the owner shall be paid for his proportion of the timber not cut by the other contractors within the time limited in the contract, and all the timber cut is pledged for such pay-

ment, he retains a lien on all the timber cut after as well as that cut during the time so limited. *Emerson v. Fisk*, 206.

See CONFLICT OF LAWS, 2; EQUITY, 8, 9; FACTORS, 2.

LIS PENDENS.

1. DOCTRINE OF LIS PENDENS IS, that whoever purchases the subject-matter of a suit, *pendente lite*, takes subject to the decree or judgment to be rendered therein, the pendency of the suit being *per se* notice to all the world. *Murray v. Blatchford*, 537.
2. PENDENCY OF A SUIT IN CHANCERY commences with the service of the subpoena. *Id.*
3. NOTICE OF AN INTERLOCUTORY PROCEEDING does not operate as *lis pendens*; as where one administrator gives notice to the two others of an intended application for the appointment of a receiver, on the ground of the insolvency and advanced age of one of the administrators, and, notwithstanding such notice, the other administrators have power to compromise or release a debt due the estate. *Id.*

LUNATICS.

1. CONTRACTS OF LUNATICS AND INFANTS are identical in their legal effects, and such acts of an infant as are void or voidable, if done by a lunatic, would be void or voidable. *Breckenridge v. Ormsby*, 71.
2. CONTRACTS OF LUNATICS ARE VOIDABLE, not void. *Id.*

MANDAMUS.

1. AFFIDAVITS IN REPLY TO A RETURN to an alternative writ of mandamus are inadmissible. *People v. Brooklyn*, 502.
2. MANDAMUS LIES where a party has a right to have a thing done, and no other specific means of enforcing it. *Id.*
3. RIGHT MUST BE COMPLETE and not inchoate to authorise a mandamus. *Id.*
4. WHERE A PARTY HAS AN ADEQUATE REMEDY by action, mandamus does not lie. *Id.*
5. PARTIES HAVING ACQUIRED A RIGHT TO MONEY specifically assessed in their favor in proceeding for opening a street, may recover it in assumpsit, and mandamus will not lie to compel its payment. *Id.*

MARRIAGE.

AGREEMENT TO MARRY PER VERBA DE PRÆSENTI, followed by cohabitation for several years, will be deemed a valid marriage, though not solemnised according to the laws of the place where the contract is made. *Newbury v. Brunswick*, 703.

MARSHALING OF ASSETS.

See ASSIGNMENT, 1.

MISTAKE.

1. MONEY VOLUNTARILY PAID THROUGH MISTAKE, to a person not having authority to receive it, may be recovered back. *Fecmaster v. Markham*, 131.

2. **MONEY PAID BY MISTAKE MAY BE RECOVERED** in an action for money had and received. *Mowatt v. Wright*, 508.
3. **MISTAKE MUST BE ONE OF FACT** to entitle a party to relief in such a case. *Id.*
4. **MISTAKE AT LAW** will not be sufficient in such a case, if there is no fraud or mistake of fact. *Id.*
5. **MISTAKE OF FACT, WHAT IS.**—A mistake of fact occurs when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. *Id.*
6. **MISTAKE OF LAW OCCURS** where a party knows the state of the facts, but is ignorant of the consequences. *Id.*
7. **MONEY PAID UNDER COMPULSION**, or where undue advantage is taken of the party's situation, may be recovered, even though there is no mistake of law or of fact. *Id.*
8. **MONEY VOLUNTARILY PAID ON AN UNFOUNDED DEMAND**, where the payee made the demand honestly and in good faith, and had brought an action to enforce it, and where the party paying supposed the facts to be just as they were, and made the payment as the cheapest mode of settlement, can not be recovered back. *Id.*
9. **LAPSE OF TIME**, short of the statute of limitations, after an alleged payment by mistake, may, it seems, be taken into consideration in an action to recover the money.

See IGNORANTIA LEGIS; INSURANCE—FIRE.

MORTGAGES.

1. **PAYMENT OF A MORTGAGE DEBT**, whether before or after forfeiture, extinguishes the debt, and the title vests in the mortgagor or his vendee, without release or reconveyance. *Breckenridge v. Ormsby*, 71.
2. **A NEW MORTGAGE GIVEN BY A VENDEE OF LAND**, in lieu of a former mortgage by his vendor, and as a part of the consideration of the deed, and a deed of such vendor held in escrow by the mortgagee's agent and delivered at the same time as the deed, constitute one entire transaction, although the deed was executed prior to the execution of the mortgage, *Dana v. Coombs*, 194.
3. **AN ASSIGNMENT OF A MORTGAGE** may be good without actual delivery, where it is connected with evidence to show that the mortgagee intended to transfer his interest. Principle applied to the assignment of a mortgage found among the papers of the mortgagee after his death. *Aldridge v. Weems*, 250.
4. **IN DISCHARGING A MORTGAGE**, THE HEIR is entitled to the aid of the personalty; but if he dispose of the mortgaged estate, without making any application for aid in redeeming it, he can not afterwards come upon the personal estate for assistance. *Havens v. Foster*, 353.
5. **AGREEMENT FOR A MORTGAGE** is in equity a specific lien on land. *In the Matter of Howe*, 395.
6. **MORTGAGE SALES** will be controlled by the court so that no injustice will be done to either party, and a part or the whole of the property sold as may best conduce to that end. *Suffern v. Johnson*, 440.
7. **WHERE ONLY PART OF THE DEBT IS DUE**, a sale of the whole property is not a matter of course, but if the person in possession is not responsible

for the debt, and the security is insufficient, the sale of the whole, or as much as may be necessary to pay the entire debt and costs, will be ordered, unless the defendant pays the installment due or gives security for the payment of the residue. *Id.*

8. **MORTGAGED PROPERTY** should be sold together or in parcels, whichever will produce the highest sum. *Id.*

See CO-TENANCY, 4, 5.

MUNICIPAL CORPORATIONS.

1. **A POWER IN THE CITY COUNCIL TO TAX** any particular part of the city for paving the streets, sinking wells, or erecting pumps, "which may appear for the benefit of such particular part," is not confined to any particular benefit, such as that which results from paved streets. The preservation of the health of such particular part of the city is a benefit within the meaning of the act conferring the power. *Baltimore v. Hughes*, 243.
2. **THE LEGALITY** of such tax does not depend upon the fact whether the paving does or does not benefit the district, but upon the object of the corporation in having the paving done. *Id.*
3. **AN ORDINANCE PROVIDING FOR SUCH PAVING** and imposition of the tax need not expressly state that it is for the benefit of the particular district. *Id.*
4. **BUT WHERE IT APPEARS** from the ordinance that the tax imposed on a particular district is for the general benefit of the city, it is void. *Id.*
5. **IDEM.**—In an ordinance declaring that if the health commissioner should report, in writing, "that a nuisance exists in any street, lane, or alley in the city of Baltimore, which will endanger the health thereof," the word "thereof" was construed not to refer to the whole city, but to a street, lane, or alley, and the ordinance was considered within the power conferred by the charter. *Id.*
6. **A MUNICIPAL CORPORATION MUST ACT** within the limits of its delegated authority. But if its ordinances admit of two constructions, they should receive the one consistent with the power given, and not that which is in violation of it. *Id.*
7. **THE UNION OF TWO BOARDS OF COMMISSIONERS**, without any direction regarding the mode of performance of their duties, will dispense with the formality of the written report which formerly one prepared before the other could act. *Id.*
8. **WHERE AN ORDINANCE REQUIRED THE COMMISSIONERS** to form a decisive opinion that a nuisance exists which would endanger the health of a particular part of the city, it is sufficient if this opinion appear from the certificates in the warrant. If the warrants disclose an opinion that the nuisance might endanger the health of the city, the tax imposed can not be enforced. *Id.*
9. **IF THE EXISTENCE OF THE NUISANCE** is required by the ordinance to be certified to in writing, the fact can not be established by parol. *Id.*
10. **ONE COMPELLED TO PAY THE DEBT OF ANOTHER** may recover from that other. Otherwise, with respect to the voluntary payment of another's debt without authority. *Id.*
11. **A MUNICIPAL CORPORATION** can not recover a tax in an action for money

paid, laid out, and expended, although the corporation has paid the cost of the improvement for which the tax was imposed. *Id.*

12. **IDEM.**—Nor can the cost of the improvement be recovered by the corporation in an action for work and labor done, etc., there being no legal liability to pay the tax therefor, the ordinance not being properly pursued. *Id.*
13. **THAT POWER IS JUDICIAL** which is vested in the mayor and aldermen of the city of Boston, as to laying out or widening streets, "whenever in their opinion the safety or convenience of the inhabitants of said town shall require it," and a certiorari lies to remove their proceedings in such a case. *Parks v. Boston*, 322.
14. **WHERE THE MAYOR AND ALDERMEN** adjudge necessary the widening of a certain street, the fact that a private individual gave a bond to contribute to the expense will not vitiate the proceedings, if such bond was not made the basis of their adjudication, and the benefit really for the individual and but colorably for the city. *Id.*
15. **VALIDITY OF BY-LAW ON SUBJECT REGULATED BY STATUTE.**—A municipal by-law imposing penalties on offenses within the jurisdiction of the corporation is not necessarily invalid because there is a statute imposing penalties for the same offenses. *Id.*

See **STREETS.**

NAVIGABLE WATERS.

See **WATER-COURSES.**

NE EXEAT.

1. **WRIT OF NE EXEAT** WAS ORIGINALLY never granted if the demand was actionable at law, but it was finally determined that in proceedings where courts of law and equity have concurrent jurisdiction, if the defendant had not been held to bail, the writ would be granted to aid and render effectual the action at law. *Lucas v. Hickman*, 44.
2. **DEMAND BEING EXCLUSIVELY** of an equitable nature, and the defendant being about to leave the state, the writ of *ne exeat* issues as of course. *Id.*

NEGOTIABLE INSTRUMENTS.

1. **DEFINITE LIES TO RECOVER A NOTE** evidencing a debt to which plaintiff has a right of property and the immediate right of possession, no matter how defendant obtained possession thereof. *Lewis v. Hoover*, 120.
2. **BRINGING AN ACTION AGAINST ONE OF THE MAKERS** of a joint and several note is an election by the plaintiff to treat it as a several contract; and judgment against one does not enable the plaintiff to treat it as a joint contract as to the others. *Bangor Bank v. Treat*, 210.
3. **ONE WHO WRITES HIS NAME ON THE BACK OF A NOTE**, at the time it was made, may be declared against as an original promisor. *Baker v. Briggs*, 311.
4. **INDORSING ON A NOTE**, "I guarantee the payment of the within note," makes the party a guarantor and not a surety. *Oxford Bank v. Haynes*, 334.
5. **GIVING A NEGOTIABLE NOTE IS NOT A PAYMENT OF MONEY** between the maker and payee so as to support an action for money had and received on failure of the consideration. *Reed v. Van Ostrand*, 529.

6. **UNLESS A NOTE IS RECEIVED AS PAYMENT** in discharge of a liability of the party sought to be charged, the giving of such note is in no case equivalent to a payment of money. *Id.*
7. **GIVING ONE'S NOTE**, in discharge of a third person's debt to the payee, is equivalent to a payment of money to the use of such third person. *Id.*
See **INTEREST**, 1; **PARTNERSHIP**, 4; **SHIPPING**, 1.

NEW TRIAL.

NEW TRIAL GRANTED, OWING TO MISCONDUCT OF APPLICANT'S COUNSEL.—If a client's rights have been wantonly or inadvertently jeopardized by his counsel, the court may afford relief by granting a new trial. *Winn v. Young*, 52.

See **APPEALS**, 6; **EQUITY**, 3.

NUISANCE.

FOR INJURY TO LAND, however inconsiderable, when occasioned by a nuisance, action on the case will lie. *Alexander v. Kerr*, 616.

See **MUNICIPAL CORPORATIONS**, 8, 9.

OFFICE AND OFFICERS.

1. **DE FACTO COURT OF APPEALS** can not exist under a written constitution which ordains one supreme court, and defines the duties and qualifications of its judges. *Hildreth v. McIntire*, 61.
2. **OFFICE DE FACTO** can not exist under a written constitution. *Id.*
3. **GOVERNMENT DE FACTO, WHEN VALID.**—The entire revolutionization of a government, the usurpation of all its departments by force, and the transfer of all its attributes of sovereignty from those who have been legally invested with them to others, who, sustained by a power above the forms of law, claim to act and do act, will, from political necessity, render the same a valid *de facto* government. *Id.*
4. **THE OFFICIAL BOND OF AN OFFICER** holding during the pleasure of the court, which is directed by statute to take a new bond every three years, will bind the sureties for the misconduct of the officer even after the three years, there being no new bond given. *Coplin v. McCalley*, 748.
5. **FOR CLERK'S TICKETS**, delivered after the first of June, in any year, the sheriff is not bound to account until the first of November of the next year. *Id.*
6. **A CLAIM ARISING OUT OF OFFICIAL NEGLIGENCE** of a clerk of a court, resident out of the state at the time the claim is asserted, is not a debt for which a foreign attachment in chancery lies. *Dunlop v. Keith*, 755.
7. **NOR IS SUCH NON-RESIDENT OFFICER AMENABLE** to the jurisdiction of the court of chancery as an absent defendant. *Id.*

See **TRESPASS**, 1.

ORPHANS' COURT.

See **ESTATES OF DECEASED PERSONS; EXECUTORS AND ADMINISTRATORS**.

PARDON.

See **CRIMINAL LAW**, 2.

PARENT AND CHILD.
See GUARDIAN AND WARD, 5, 6.

PARTNERSHIP.

1. SEVERANCE OF THE LIABILITY OF PARTNERS for their joint debts is not produced by an assignment under seal of the firm property to pay the debts on condition that the creditors will look to the partners individually for their proportion of the balance of the debts remaining unpaid, after dividing the property as assigned, unless the creditors accept the condition, and the partners individually covenant to pay their respective shares. *Le Page v. McCrea*, 469.
2. MERGER.—Where a partnership is indebted, and the partners severally covenant to pay, each his proportion of the debts, and the creditor thereupon releases the partners from their joint liability, the original contract or debt is merged. *Id.*
3. PAYMENT BY A PARTNER, UNDER A COMPROMISE, of a specific sum in satisfaction of a partnership debt, discharges it, and it can not be kept alive by an agreement between the creditor and the paying partner to enable the latter to collect it from his copartner. *Id.*
4. LIABILITY OF MERCANTILE PARTNERSHIP ON NOTE MADE IN FIRM NAME.—A mercantile partnership is liable on a promissory note signed by one of its members, in the firm name, without the knowledge or consent of his copartners; although the note was given for the debt of a third person unconnected with the partnership business. *Hawes v. Dunton*, 663.
5. CREDITORS OF THE FIRM HAVE NO PREFERENCE, in Vermont, over creditors of individual partners in attaching the property of the firm. *Reed v. Sheperdson*, 697.
6. TO ATTACH THE PARTNER'S INTEREST IN THE FIRM GOODS, they must be taken into possession. *Id.*
7. OFFICER TAKING FIRM GOODS INTO POSSESSION under an attachment against an individual partner is not liable as a trespasser, though the firm be insolvent. *Id.*

PAUPERS.

ORDER FOR THE REMOVAL OF A PAUPER, his family and effects, from one town to another, is valid as to the pauper only. *Newbury v. Brunswick*, 703.

PAYMENT.

See ACCORD AND SATISFACTION; NEGOTIABLE INSTRUMENTS, 5, 6, 7.

PERSONAL PROPERTY.

See ACCESSION; STATUTE OF LIMITATIONS.

PLEADING AND PRACTICE.

1. PROPER PARTIES HAVING BEEN OMITTED from the bill intentionally for the purpose of giving the case a more specious semblance of equity, the bill will be dismissed without prejudice. *Rowland v. Garman*, 64.
2. PLEADINGS.—Whatever is well set forth in a plea, and not controverted in the replication, is admitted to be true. *Phillips v. Harriess*, 166.
3. WHERE THE FACTS CHARGED IN THE BILL were admitted to be true, and no replication was introduced, but the parties agreed to submit the

- cause on the pleadings, the question to be decided is, whether the proceedings of the defendant, be they a plea or an answer, are sufficient in law to bar the plaintiff's claim. *Tiernan v. Poor*, 225.
4. **THE PLAINTIFF'S CLAIM TO RELIEF** in equity must appear from the pleadings. The style and character of pleading in equity are of a more liberal cast than those of other courts. *Id.*
 5. **THE GENERAL ISSUE PLEADED** does not admit the character in which one sues who claims to be the trustee of an insolvent debtor. *Winchester v. Union Bank*, 253.
 6. **IDEM.**—On the general issue, the plaintiff must prove everything essential to the showing himself clothed with the character and authority of a trustee. *Id.*
 7. **SUPPLEMENTAL BILL WHERE ORIGINAL IS DEFECTIVE.**—Proceedings founded on an original bill, so entirely defective that no valid decree can be made, can not be sustained by a supplemental bill based on subsequent facts. *Candler v. Pettit*, 399.
 8. **AMENDMENT OF DEFECTIVE BILL, WHEN PROPER.**—Where a bill is defective in omitting facts existing at the time, they should be inserted by amendment. *Id.*
 9. **NEW BILL PROPER REMEDY, WHEN.**—Where a complainant had no ground for proceeding originally, but subsequently becomes entitled to relief, he should file a new bill. *Id.*
 10. **SUPPLEMENTAL BILL IS PROPER** when the original bill is sufficient to entitle the complainant to one kind of relief, and facts afterwards occur giving him a right to other or more extensive relief. *Id.*
 11. **COURT HAVING OBTAINED JURISDICTION** for temporary relief may retain it generally. *Id.*
 12. **SUPPLEMENTAL BILL FOR AN INJUNCTION** may be filed, founded on facts subsequently arising, where the original bill was for a *re exeat* and an injunction, and the injunction was disallowed because the party was not then entitled to it. *Id.*
 13. **NON-JOINDER OF PARTIES** is matter for a plea in abatement. *Le Page v. McCrea*, 469.
 14. **DISCONTINUANCE OF ACTION BY DELAY IN SERVICE.**—Where the statute provides that in an action in a justice's court, commenced by summons, if the summons is not personally served, and the defendant does not appear nor show good cause for not doing so, the justice may issue another summons or warrant, at his option, such subsequent summons or warrant must be issued within a reasonable time, or the action will be discontinued. *Bissell v. Gold*, 480.
 15. **REASONABLE TIME** in such a case would be the time allowed by law for the return of the original summons. *Id.*
 16. **DEFENDANT HAVING A JUSTIFICATION AND JOINING IN A PLEA** with a co-defendant who can not justify, loses his defense; but the plaintiff must show a cause of action against him on the general issue before he is called on to justify. *Id.*
 17. **UNCONTRADICTED AND RESPONSIVE ANSWER** to a bill charging fraud, denying such fraud, will be taken as true. *Murray v. Blatchford*, 537.

See AMENDMENTS; COSTS.

POOR LAWS.

See PAUPERS.

PRESCRIPTION.

See ESTOPPEL, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIVIES.

1. PRIVIES IN BLOOD AND IN REPRESENTATION may avoid the voidable deeds of infants and lunatics, but privies in estate can not. *Breckinridge v. Ormsby*, 71.
2. PRIVIES IN ESTATE, discussed, explained, and held not to include a purchaser from the person under disability after such disability has been removed, and that such purchaser might avoid a deed which his vendor could have avoided. *Id.*

PROBATE COURTS.

See ORPHANS' COURTS.

QUANTUM MERUIT.

1. WHERE ONE HAS ENTERED INTO A SPECIAL CONTRACT to perform work for another, and to furnish materials, and the work is done, and the materials are furnished, but not in the manner stipulated, so that he can not recover on the contract, yet if the work and materials are of any benefit to the other party, a recovery may be had on a *quantum meruit* for the work, and a *quantum valebant* for the materials. *Hayward v. Leonard*, 268.
2. PRINCIPLE APPLIED TO A CONTRACT FOR BUILDING A HOUSE, and the measure of damages fixed at the contract price, deducting therefrom so much as the house was worth less on account of the departure from the contract. *Id.*

REAL ESTATE.

1. COMPLETE LEGAL TITLE is the right and the possession united. *Fitzhugh v. Croghan*, 139.
2. FORCIBLE OUSTER.—A person who is in possession of property of the United States can not be forcibly ousted therefrom by order of a surveyor of customs. *Bailey v. Taylor*, 175.
3. LOTS OF LAND IN EACH RANGE OF A NEW TOWNSHIP, numbered in regular arithmetical series, are presumed to have been located contiguous to each other; the lot numbered eight in such a series is presumed to include all the land lying between those numbered seven and nine, and a party claiming a different location must repel this presumption by positive proof. *Warren v. Pierce*, 189.

4. POSSESSION AS EVIDENCE OF TITLE.—Possession of land for twenty-two years is sufficient evidence of ownership to enable one to recover in ejectment against a defendant who can not show a better title. *Varick v. Jackson*, 571.

RECORDING.

DEED MUST BE RECORDED IN THE COUNTY where the land lies at the date of recordation. *Garrison v. Haydon*, 70.

REMAINDERS.

- A DEVISE TO A. DURING HIS NATURAL LIFE, and after his decease, leaving lawful issue to his heirs, as tenants in common and their respective heirs and assigns forever, but in case of A.'s death without lawful issue, then to B. to his heirs and assigns forever, gives to A. a life estate; and his issue, as tenants in common, and B. respectively take contingent remainders, only one of which could ever become vested, and that only on A.'s death. *Stump v. Findlay*, 632.

REPLEVIN.

1. REPLEVIN LIES WHEREVER TRESPASS *de bonis asportatis* would lie. *Marshall v. Davis*, 463.
2. WRONGFUL TAKING from the actual or constructive possession of the plaintiff is necessary to support trespass or replevin in the *cepit*. *Id.*
3. WRONGFUL DETAINER AFTER A LAWFUL TAKING is not equivalent to a wrongful original taking. *Id.*
4. DELIVERY BY A BAILEE WITHOUT AUTHORITY to one who is ignorant of the owner's rights does not constitute such a wrongful taking of a chattel by the party so receiving it as to support replevin. *Id.*
5. WIFE OF THE BAILEE IS A COMPETENT WITNESS in such a case, because the bailee's interest is balanced, he being liable in any event. *Id.*

See BAILMENTS, 3; EXERCUTIONS, 2.

RESCISSION OF CONTRACTS.

RESCISSION, WHEN DECREED.—A purchaser has no right to rescind a contract for the purchase of land, because it was not reduced to writing, if the vendor has complied with his contract, or is willing to do so. *Rowland v. Garman*, 54.

SALES.

1. SLIGHT EVIDENCE OF A DELIVERY IS SUFFICIENT to support a *bona fide* sale for value. Obtaining possession by the vendee, with the vendor's consent, before any attachment or second sale, completes the transfer, without formal delivery. Principle applied to furniture sold in a building leased to the vendee, of which he takes possession together with the vendor. *Shumway v. Rutter*, 340.
2. IT WAS NOT A DELIVERY OF PEW PANELS, contracted to be made and delivered at a meeting-house in process of construction, and to be paid for in cash on delivery, to leave them at the meeting-house in the absence of the vendee from the town, and they could not be attached as the property of the latter. *Woodbury v. Long*, 345.

2. **ACTION FOR SELLING ONE ARTICLE FOR ANOTHER** will not lie, except where there is fraud or a warranty. *Welsh v. Carter*, 473.
4. **SALE OF A SPURIOUS AND WORTHLESS ARTICLE**, fraudulently made to resemble a valuable commodity for which it is sold, will not authorize an action by the vendee against his vendor, who is ignorant of the fraud, and has given no warranty. *Id.*
5. **RULE OF CAVEAT EMPTOR** requires that the vendee shall guard against latent defects, by demanding a warranty, or bear the loss himself. *Id.*
6. **THE FACT THAT THE VENDOR HAS A REMEDY OVER** against the person from whom or through whom he obtained an article, does not make him liable to his vendee for defects therein, in the absence of fraud or warranty. *Id.*
7. **FALSE REPRESENTATIONS BY A VENDOR**, which are not shown to have induced the purchase, and the falsity of which the vendee might have discovered with diligence, do not constitute a fraud avoiding a promissory note given for the purchase-price. *Williams v. Hicks*, 693.
8. **A SALE OF SHEEP ON THE LAND OF A THIRD PERSON** whom the vendee asks to select the sheep from a larger number pasturing on the land, and who does make such selection, and marks those selected with the initials of the vendee, will constitute a good delivery as against creditors of the vendor, although the sheep remain on the land of the third person, the same as before the sale. *Barney v. Brown*, 720.

See **FRAUDULENT CONVEYANCES**, 2; **WARRANTY**.

SEALS.

See **CONTRACTS**, 34; **DEEDS**, 21.

SEISIN.

See **COVENANTS**; **DEEDS**, 1.

SET-OFF.

1. **EQUITABLE SET-OFF NOT AFFECTED BY APPOINTING RECEIVER**.—The appointment of a receiver of a bank does not affect the right of its debtors to set off demands held by them against the bank when it stopped payment. *In re Middle District Bank*, 452.
2. **DEBT WHICH BECOMES DUE** after the stoppage of payment may be set off. *Id.*
3. **INDORSER HAS THE SAME RIGHT OF SET-OFF** in such a case as the principal debtor, if he is undemnified and is compelled to pay because the principal can not; but not otherwise. *Id.*
4. **OVERDRAWING** is a debt due the bank, and bills held *bona fide* when the bank stopped payment by the person so overdrawing may be set off against such debt. *Id.*
5. **BILLS OBTAINED BY A DEBTOR** after the stoppage of payment of a bank can not be set off against debts due it. *Id.*

SHERIFFS.

1. **DEPUTY SHERIFF HAS POWER** to make conveyances of lands sold under execution. *Haines v. Lindsey*, 586.

2. **WARRANT APPOINTING DEPUTY SHERIFF**, if filed with the clerk, is valid, although not indorsed by him. *Id.*
3. **FARMING THE OFFICE OF SHERIFF** to a deputy, who is to discharge all the duties of the office and receive all the emoluments, in consideration of a gross sum paid to the sheriff, is not prohibited in Virginia. *Salling v. McKinney*, 722.
4. **SALE OF AN OFFICE, WHAT IS.**—If an officer appoints a deputy who agrees to pay the principal a specific sum, and perform the duties of the office, this is a sale of the office; and a bond for the performance of such an agreement is void. *Per Carr, J. Id.*

See ATTACHMENT; STATUTES, 3, 4.

SHIPPING.

1. **LIABILITY OF JOINT OWNERS OF VESSEL FOR SUPPLIES.**—A negotiable note given for supplies for a vessel given by one of two joint owners, who was also the master, jointly in his own and the other owner's name, but without authority of the latter, is void as to him; but both owners are liable to the promisee on the general counts. *Wilkins v. Reed*, 211.
2. **CHANGING THE VOYAGE.**—The owner of the ship and cargo has the uncontrolled power of breaking up or changing the voyage. *Pawson v. Donnell*, 213.
3. **IDEM.**—The effect of the exercise of such power upon the contract between the owner, and master or supercargo, must be governed by these principles, in the absence of all commercial usage on the subject. If special injury be done thereby to the captain or supercargo, the ship owner must bear the loss. If the captain or supercargo be thereby necessarily discharged from the performance of all the duties, for which a remuneration has been stipulated, the claim to such remuneration becomes extinguished. If part of the duties have been performed, such proportion of the remuneration should be allowed as appears just on comparing the services rendered, under the voyage originally contemplated, with those remaining unperformed. *Id.*
4. **IDEM.**—The parties should be placed, as nearly as may be, in the same condition in which they would have stood had a previous contract for the voyage as changed have been entered into between them. *Id.*
5. **THE CAPTAIN'S PRIVILEGE** agreed to be allowed from a certain port contemplated by the original voyage necessarily expires when that port ceases to be one of the *termini* of the voyage, by reason of a change of instructions given by the owner. *Id.*
6. **MISCONDUCT OF THE CAPTAIN** producing neither injury nor inconvenience to the owner, is no defense to an action for the payment of wages. *Id.*
7. **THE CONSIGNEES SELECTED BY THE SHIPMASTER**, or supercargo, in a foreign port, according to usage, and *bona fide*, are so far the agents of the owner of the ship and cargo that upon the death of the captain or supercargo, his representatives are not responsible for the acts of such consignees after his death, not imputable to instructions given during his life-time. *Id.*
8. **A SHIPMENT OF PROHIBITED MERCHANDISE** by the supercargo on the owner's account, but without his knowledge or consent, is at the supercargo's risk. *Id.*

2. **IDEM.**—The acceptance by the owner of the letters and invoices sent to him by the consignees in a foreign port is not such a ratification of their acts as would throw on him the loss arising from the seizure of prohibited articles exported by them on his account. *Id.*

SPECIFIC PERFORMANCE.

1. **COVENANTER HAVING ELECTED TO SUE AT LAW** for damages for breach of contract, equity will not compel him to give up his judgment, and accept specific performance, unless the judgment has been procured unfairly, or he has been guilty of fraud or negligence. *Craig v. Martin*, 157.
2. **VENDEE BEING IN POSSESSION**, equity will, upon the vendor's application, decree a specific performance, although the time fixed in the contract for conveying has elapsed, if the vendor is not in fault, but the delay has been caused by the state of the title. *Id.*
3. **TIME IS NOT THE ESSENCE** of such a contract, and if a good title can be made in a reasonable time, it is sufficient. *Id.*
4. **SPECIFIC EXECUTION OF A CONTRACT** in writing for the transfer of property will be decreed in equity as between the parties, although some circumstances to give it legal validity are omitted, provided it contain proper and apt terms whereby the intention of the parties can be clearly ascertained. *Tierman v. Poor*, 225.
5. **PART PERFORMANCE OF A PAROL AGREEMENT** respecting land, to warrant a specific enforcement of the contract, must be in consequence of the contract. *Squire v. Harder*, 446.
6. **SPECIFIC PERFORMANCE OF A PAROL AGREEMENT** will be decreed against defendants who set it up and join in a prayer for its specific execution. *Id.*
7. **HUSBAND CAN NOT MAKE AN AGREEMENT** affecting the wife's rights without her consent, and such an agreement, she not being a party, will not be enforced in equity. *Id.*

STATUTES.

1. **PENAL STATUTES** should be strictly construed. *Gates v. McDaniel*, 49.
2. **CONSTRUCTION OF STATUTES.**—The intent of the legislature ought not to be sought for outside of the statute, unless the words are doubtful and uncertain. *Per Carr, J. Salling v. McKinney*, 722.
3. **THE OFFICE OF A PROVISIO** is not to repeal, but to modify the enacting clause of a statute. *Per Carr, J. Office of sheriff, history of in Virginia, and of the deputation and sale thereof. Per Carr, J. Id.*
4. **A PROVISIO in a statute** is not to enlarge the operation of the enacting clauses. *Per Green, J., Coalter and Cabell, JJ., concurring. Farming the office of sheriff, history of in Virginia. Per Green, J., Coalter and Cabell, JJ., concurring. Id.*

See ALIMONY.

STATUTE OF FRAUDS.

1. **PAYMENT OF A PART OR THE WHOLE** of the purchase-price, is insufficient to take a contract out of the statute of frauds. *Allen v. Booker*. 33.

2. **ASSUMPSIT FOR MONEY HAD AND RECEIVED** lies for money paid on a contract void by the statute of frauds. *Id.*

STATUTE OF LIMITATIONS.

SURRENDER OF POSSESSION OF PERSONAL PROPERTY ACQUIRED BY.—A party who, after acquiring title to personal property by the statute of limitations, surrenders the possession of it, upon a compromise with the original owner, can not afterwards set up title under the statute, although at the time of the surrender he expressed his determination to pursue his right. *Meek v. Atkinson*, 653.

See **COTENANCY**, 2; **MISTAKE**, 9; **TRUSTS AND TRUSTEES**, 10.

STOPPAGE IN TRANSITU.

1. **GOODS SHIPPED ARE IN TRANSITU** until taken possession of on behalf of the consignee. *Naylor v. Dennie*, 319.
2. **RIGHT OF STOPPAGE IN TRANSITU** is not defeated by the attachment of the goods on board the vessel as the property of the consignee. *Id.*
3. **RIGHT OF STOPPAGE IN TRANSITU** is adverse to the consignee, yet is not defeated by a relinquishment by him of the consignment. *Id.*

STREETS.

1. **PROCEEDINGS IN LAYING OUT STREETS—DISCONTINUANCE.**—After a verdict of a jury and the judgment of the proper officer thereon, a party has a vested right in damages awarded him in consequence of laying out a street, and the trustees of the town can not defeat that right by discontinuing the proceedings. *Hawkins v. Rochester*, 462.
2. **POWER TO DISCONTINUE PROCEEDINGS FOR OPENING STREETS.**—The trustees of a municipal corporation have no power to discontinue proceedings for opening a street after rights have become vested under such proceedings. *People v. Brooklyn*, 503.
3. **NO POWER TO DISCONTINUE AFTER COMMISSIONERS' REPORT CONFIRMED.**—After the trustees, in such a case, have confirmed the report of the commissioners of appraisement, they are *functi officio*, and can not discontinue the proceedings, the rights of parties having become vested thereunder; but, until then, they have a discretion in the matter. *Id.*

SURETYSHIP.

1. **A SURETY HAS THE SAME DEFENSES AT LAW**, in Massachusetts, when sued alone, as he would have in equity. *Baker v. Briggs*, 311.
2. **A CREDITOR HOLDING PROPERTY** of the principal debtor as security for his demand, will lose his remedy against the surety to the value of the property, should the same be released without the surety's consent. *Id.*
3. **IF THE SURETY IS TOLD BY THE CREDITOR** that the debt is paid, and thereby loses an opportunity of securing himself, he is discharged, although the debt was not paid and the creditor acted under a mistake. *Id.*
4. **WHERE A CREDITOR RECEIVED THE NOTE** of a third person from the principal debtor, and gave a receipt that it was received "in security for all notes signed by" the debtor, in an action against the surety, parol evi-

dence was admitted to show that the note was received in payment, with the intent to discharge the debtor and his surety. *Id.*

5. AS BETWEEN A SURETY WHO HAS PAID A JUDGMENT against his principal, and a subsequent judgment-creditor of the principal, the former has preference. *Fleming v. Beaver*, 629.
6. A SURETY PAYING A JUDGMENT against his principal is substituted by operation of law to the rights of the creditor. *Id.*

SURVEYS.

See REAL ESTATE, 3.

TAXATION.

See MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 5, 11, 12.

THEFT.

See LARCENY.

TITLE.

See REAL ESTATE, 1.

TRESPASS.

1. IN TRESPASS, THE DEFENDANT MAY SHOW as a justification that he acted under the command of an officer in the execution of process, although the process may not be regular and valid; but if he acted officiously, he must show a valid process. *Reed v. Rice*, 122.
 2. A MORTGAGEE OF PERSONALTY MAY MAINTAIN TRESPASS against one who takes it from the possession of the mortgagor, although at the time the debt is not due. *Woodruff v. Halsey*, 329.
 3. A MORTGAGEE OF A BUILDING ON A THIRD PERSON'S LAND may maintain trespass against a stranger who tears it down, and carries the materials away, it being unoccupied, and not in the actual possession of the mortgagee at the time. *Id.*
 4. TRESPASS LIES AGAINST ONE WHO CARRIES AWAY the materials of a building, although he did not assist in the pulling down. *Id.*
 5. POSSESSION TO MAINTAIN TRESPASS.—The right to reduce a chattel into actual possession is sufficient to maintain trespass for taking it. *Buck v. Aikin*, 535.
 6. POSSESSION OF A PART OF A TRACT OF LAND without title can not be extended by construction to the part not in actual possession of the party so as to enable him to reclaim timber cut thereon. *Id.*
 7. PURCHASER'S RIGHT AS TO TREES CUT BEFORE PURCHASE.—The purchaser of a lot can not reclaim trees cut and removed therefrom before his purchase. *Id.*
 8. PROPERTY IN A STRANGER IS NO DEFENSE IN TRESPASS *de bonis asportatis*, though it is otherwise in trover. *Id.*
 9. FOR JOINT INJURY DONE BY DOGS owned by separate owners, an action of trespass against such owners will not lie. *Adams v. Hall*, 690.
- See ARREST, 1; ATTACHMENT, 1, 2; EVIDENCE, 10; INFANCY, 7, 10, 12.

TROVER.

1. A TORTIOUS TAKING OF ANOTHER'S CHATTEL is a conversion. *Woodbury v. Long*, 345.
 2. PROOF OF DEMAND AND REFUSAL in trover is not necessary where there has been an actual conversion. *Newsum v. Newsum*, 739.
 3. WHETHER A NAKED TRUSTEE OF A CHATTEL can recover full damages in trover, *quære*. *Id.*
- See ATTACHMENT, 4; EXECUTORS AND ADMINISTRATORS, 31, 32; TRUSTS AND TRUSTEES, 6.

TRUSTS AND TRUSTEES.

1. A TRUSTEE'S PURCHASE AT A SALE of the trust property is not void; it will bind the *cestui que trust* if he acquiesce; if he dissent in a reasonable time, the trustee will be considered as holding for him. *Jennison v. Hapgood*, 258.
2. RESULTING TRUST TO A GRANTOR, contrary to the express terms of his conveyance, can not be raised. *Squire v. Harder*, 446.
3. CONVEYANCE IN FEE, WITH WARRANTY, ESTOPS the grantor from alleging an interest in the purchase-money which will raise a resulting trust to him. *Id.*
4. DELIVERY OF TRUST DEED.—Where the grantee in a deed of trust agreed to accept the trust, and the deed was put on record pursuant to the directions of the grantor, the delivery was sufficient. *Steele v. Lowry*, 581.
5. PROPERTY CONVEYED TO TRUSTEE for the benefit of the issue of a contemplated marriage, and to be sold on the direction of the grantor, inures to the benefit of such issue, although the grantor die without directing the sale. *Id.*
6. TRUSTEE MAY MAINTAIN TROVER against his *cestui que trust* for a conversion of the trust property. *Guphill v. Isbell*, 675.
7. COURT OF EQUITY ALONE CAN COMPEL TRUSTEE to execute or surrender his trust. *Id.*
8. RESULTING TRUST.—Where one person purchases a chattel with the funds, and for the use, of another, but takes the bill of sale in his own name, a resulting trust arises in favor of the owner of the fund, and he may elect to take the chattel or the fund; but the purchaser holds the legal title to the chattel. *Id.*
9. EVIDENCE ESTABLISHING EXISTENCE OF TRUST does not justify a presumption that the trust has been surrendered; nor does delivery of the property to one not authorized to discharge the trustee, amount to a surrender of the trust. *Id.*
10. STATUTE OF LIMITATIONS PROTECTS THE POSSESSION of a party claiming under the trustee, and adverse to the *cestui que trust*, after the surrender of the trust. *Id.*

TRUSTEE PROCESS.

See GARNISHMENT.

USAGE.

See EVIDENCE, 6.

USE AND OCCUPATION.

ASSUMPSIT FOR USE AND OCCUPATION WILL NOT LIE, after a recovery in ejectment, to recover rents and profits, accruing after the date of the demise in the declaration. *Butler v. Cowles*, 612.

See **VENDOR AND VENDEE**, 2.

USURY.

1. **EQUITABLE RELIEF FROM USURIOUS CONTRACT**.—A party seeking equitable relief from an usurious contract will not be entitled to an injunction against proceedings at law, or to an answer, until he pays or tenders the amount actually borrowed. *Morgan v. Schemerhorn*, 449.
2. **INJUNCTION ALREADY GRANTED** will not be dissolved in such a case, if an answer is put in without objection, if usury appears, and the complainant is still willing to pay what is really due. *Id.*
3. **EVADING THE STATUTE AGAINST USURY**.—Covering up an usurious loan by a sale of land at an extravagant price is a devise to evade the statute, which will not be permitted to avail the lender in equity. *Id.*

VENDOR AND VENDEE.

1. **VENDEE IN POSSESSION**, disaffirming the contract, and recovering damages for non-conveyance, is liable for rents, subject to the value of improvements placed by him on the land. *Craig v. Martin*, 157.
2. **ONE IN POSSESSION UNDER A CONTRACT** for the purchase of land is not liable to pay rent on the implied contract for the use and occupation, if the owner fail to execute a conveyance. *Little v. Pearson*, 289.

See **LEASES**, 2; **SPECIFIC PERFORMANCE**.

VERDICT.

1. **SETTING ASIDE VERDICT FOR IMPROPER CONDUCT OF JUROR**.—Where the prevailing party to an action, during the term of court, but previous to the trial, took one of the jurors in his sleigh several miles to the house of a friend, where he was hospitably entertained, the verdict was for this cause set aside. *Cottle v. Cottle*, 200.
2. **A VERDICT WILL NOT BE SET ASIDE** as against evidence, where there is evidence on both sides, unless where it is manifest that the jury have mistaken or abused their trust. *Baker v. Briggs*, 311.

See **AMENDMENTS**, 4; **APPEALS**, 4; **EVIDENCE**, 5.

WAGERS.

1. **WAGERS AT THE COMMON LAW** were legal, and might be enforced, unless they were against public policy, or of an immoral tendency, which affected the feelings, interests, or character of a third party, or tended to disturb the peace of society. *Stoddard v. Martin*, 643.
2. **WAGERS UPON THE RESULT OF AN ELECTION** give to one party a pecuniary interest in the election of a person to office, and to another the same interest in such person's defeat; consequently, such wagers are against public policy, and therefore invalid. *Id.*

WARRANTY.

IMPLIED WARRANTY.—The principle of implied warranties is directed only against those secret defects against which the most skillful can not al-

ways guard; and where the seller was not guilty of any fraud, deceit, misrepresentation, or concealment, and the buyer had opportunity, by the exercise of ordinary diligence, to acquire a knowledge of any fact necessary to enable him to form a correct estimate of the value of the thing he is about to purchase, the law will not raise an implied warranty that the thing should answer the purpose for which it was bought. *Carrochan v. Gould*, 668.

See COVENANTS, 2, 7; DAMAGES.

WATER-COURSES.

1. LAND UNDER WATER PASSES BY A CONVEYANCE by metes and bounds, if included within the specified boundaries. *Rogers v. Jones*, 493.
2. LAND COVERED BY ARMS OF THE SEA OR BY NAVIGABLE RIVERS, so far as the tide ebbs and flows, belongs to the king at common law, who may grant the same to a subject. *Id.*
3. PRIVILEGE OF FISHING IN NAVIGABLE RIVERS and arms of the sea belongs, *prima facie*, to the king, and is public, but an individual may, by grant or prescription, acquire an exclusive right of fishing therein. Nor is there any prohibition of such grants in *Magna Charta*. *Id.*
4. PATENT TO INHABITANTS OF THE TOWN OF OYSTER BAY from Sir Edmond Andross, in 1677, conveyed an exclusive right of fishing in the waters included within the grant, and such right being the common property of the inhabitants, may be governed and regulated by rules adopted in town meeting. *Id.*
5. LEGISLATIVE CONTROL OVER PUBLIC STREAMS and rights of fishery therein, so far as may be necessary to protect navigation and preserve the fish from destruction, is not prejudiced by a grant to individuals of the soil under such streams, or of an exclusive privilege of fishing in them. *Id.*

WAYS.

See EASEMENTS, 1, 3.

WILLS.

1. TESTAMENTARY CAPACITY.—To make a valid will, the testator must be of sound and disposing mind and memory, capable of disposing of his property with sense and judgment with respect to the condition and value of the property and the relative claims of the objects of his bounty. *Clark v. Fisher*, 402.
2. OPINIONS OF WITNESSES are never received as evidence where all the facts on which they are founded can be ascertained and made intelligible to the court or jury. *Id.*
3. WEIGHT OF OPINIONS OF WITNESSES AS EVIDENCE, when necessarily received, depends not so much on the number of the witnesses as upon their capacity and opportunities for information, the unprejudiced state of their minds, and the nature of the facts. *Id.*
4. BURDEN OF PROOF AFTER GENERAL DERANGEMENT ESTABLISHED.—When general derangement or loss of the mental powers of a testator, before the making of his will, is established, the burden of proof is upon the proponents of the will to show that the incapacity had ceased at its execution. *Id.*

5. **UNREASONABLENESS OF THE WILL** is proper evidence with respect to the state of the testator's mind. *Id.*
6. **WILL INDUCED BY FRAUD, IMPOSITION, or undue influence**, which makes a different disposition from that which the testator would otherwise have made, will be set aside in a court of equity. *Id.*
7. **SURROGATE'S JURISDICTION AS TO FRAUD AND UNDUE INFLUENCE**.—Surrogates having exclusive jurisdiction of the proof of wills of personalty must necessarily determine all questions of fraud, imposition, undue influence, and testamentary capacity, in the case of such a will. *Id.*
8. **MISTAKE IN WILL**.—Parol evidence is admissible to show who was intended by a bequest made to one by a wrong Christian name. *Connolly v. Pardon*, 433.
9. **PROOF OF A WILL BY ONE OF THE ATTESTING WITNESSES** is sufficient, if he can testify to a compliance with all the requirements of the statute as to the execution, acknowledgment, and attestation. *Jackson v. Vickory*, 522.
10. **IF THE WITNESS CAN TESTIFY ONLY TO HIS OWN PART** in the transaction in such a case, the other witnesses must be produced, if living and within the jurisdiction of the court, and if dead, or beyond the jurisdiction, their handwriting and that of the testator should be proved. *Id.*
11. **PROOF BY ONE WITNESS INSUFFICIENT, WHEN**.—When the witness who is produced can not remember whether or not the other witnesses subscribed their names in the presence of the testator, but presumes that they did so, as he would not have subscribed as a witness if the law had not been complied with, and the other witnesses are living and within the state, the proof is insufficient because it presents secondary evidence of a fact of which better evidence is within the party's reach. *Id.*
12. **TESTATOR POSSESSED OF CAPACITY TO TRANSACT ORDINARY BUSINESS OF LIFE**, may make a will, however inferior his capacity or weak his understanding, either from natural or adventitious causes. *Tomkins v. Tomkins*, 656.
13. **THE REASONABLENESS OF A WILL** is a circumstance in favor of the testator's capacity, where there is doubt as to such capacity. *Id.*
14. **ABILITY TO RECOLLECT MINUTELY INSTRUCTIONS GIVEN THE DAY BEFORE** is wholly inconsistent with the imbecility and alienation of mind that incapacitates from making a will. *Id.*
15. **PROOF OF INSTRUCTIONS FOR, OR THE READING OF, THE WILL**, is necessary where the capacity of the testator is in any degree of doubt. *Id.*

WITNESSES.

See EVIDENCE, 4, 8, 15, 21; REPLEVIN, 5; WILLS, 2, 3, 9, 10, 11.

WORDS.

See DEEDS, 18.

WRITS OF ERROR.

See APPEALS.



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